Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

FANNY M. RILEY, as Administratrix of the Estate of Ralph E. Lowe, deceased, et al.,

Petitioners,

v.

PATRICK NEWTON, individually and in his official capacity as a de facto officer with the Richmond County, Georgia, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's rule that the Posse Comitatus Act is implicated only when military participation pervades the activities of civilian officials is in conflict with (a) the legislative history and language of the statute and related statutes, and (b) the tests from other Circuits, which prohibit the direct action complained of herein.

2. Whether the Congressionally created principle against use of the Army to enforce civilian law is so important and clear, where there is no questionable order from statutorily created sources, prohibits a qualified immunity herein, notwithstanding the Eleventh Circuit's parochial view that besides this Court, only it can establish clear law by a pre-existing, factually undistinguishable case, and where the line of separation of powers has been crossed.

3. Whether these Defendants violated a Fourth or Thirteenth Amendment right, or a privilege or immunity created by the Posse Comitatus Act, because of the racially related reasons for the stops, or the manner of the seizure, and whether the matter should have been sent to the jury.

4. Whether the jury should get the issue of entity liability on the theory of failure to train Deputy Glisson about the limits of the use of Army personnel and the *de facto* deputy theory, with charges specifically relating to the Posse Comitatus Act, reversing the decision of the

QUESTIONS PRESENTED – Continued

Circuit which was based on a prima facie case plus requirement, which disregarded the District Court's weighing of the opposing evidence and its recognition that the jury should hear the case.

5. Whether the claim against the Sheriff individually should be reinstated, in light of the Posse Comitatus Act, and the clear Congressional prohibition against use of military by civilians, for the Sheriff's failure to have training on this quintessential area of law enforcement, in selection of personnel and equipment, given a Sheriff's duty to uphold the Constitution and laws.

LIST OF PARTIES

The following individuals or entities may have an interest in the outcome of this Appeal:

Batson, John P. – Attorney for Appellant
Burnside, Wall, Daniel, Ellison & Revell
Burnside, Thomas R., Jr. – Attorney for Appellees
Burnside, Thomas R., III – Attorney for Appellees
D'Alessio, Laurie S. – Attorney for Appellees
Ellison, James W. – Attorney for Appellees
Revell, Harry D. – Attorney for Appellees
Wall, James B. – Attorney for Appellees
Czura, John – Attorney for Appellant
Glisson, Kenneth – Appellee
Green, Steven – Former Defendant
Lowe, Ralph E. Estate of – Appellant
Lowe, Jr. and Antonio M. Lowe – Appellant
Newton, Patrick – Pro-se Appellee (has not filed answer)
Padron, Dave – Former Defendant
Reno, Janet – United States Attorney General, attorney for former Defendant
Richmond County, Georgia – Appellee
Riley, Fannie M. – Appellant
Riley, Fannie M. as next friend for the children, Ralph E. and Antonio Lowe – Appellant
Webster, Charles – Appellee

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OPINIONS BELOW

This is an appeal from an Eleventh Circuit decision. *Riley v. Newton*, No. 95-8873 (11th Cir. September 11, 1996). (App. 1-16). The District Court opinion is *Riley v. Newton*, No. CV 191-171 (S.D. Ga. Order Feb. 21, 1996). (App. 17-51).

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on September 11, 1996, based on a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), which was granted by the Eleventh Circuit on July 13, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Posse Comitatus Act. 18 U.S.C. § 1385:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise, to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both.

STATEMENT OF THE CASE

Course of Proceedings Below

This action was brought pursuant to 42 U.S.C. § 1983 and the Federal Tort Claims Act for violations of the Constitution of the United States and the laws of the State of Georgia. (R. 1-1). The action was brought by the Estate of Ralph Lowe through the Administratrix, Fannie M. Riley, and on behalf of the survivors, Ralph E. Lowe, Jr. and Antonio M. Lowe, the children of the deceased, Ralph E. Lowe.

The action was brought against Patrick Newton, then an Army MP, who was acting as a *de facto* deputy for the County. The County relied upon his connections with, and training by the Army as a policeman. While acting as a *de facto* deputy Newton shot Lowe with his unwieldy MAC-11, of which Defendant Glisson knew; at the time, Newton was trying to handcuff Lowe. Richmond County, Georgia is a Defendant because they used Mr. Newton as a *de facto* deputy in that capacity for a substantial period, and a policymaker counted on the *de facto* deputies for back up on routine civilian matters. Deputy Glisson was sued because he made the decision to make the initial stop and he used Newton as a *de facto* deputy for an extended period. The Sheriff was also sued in his individual and official capacity, because it was the Sheriff who had ultimate responsibility for using military personnel to work with the Sheriff's Deputies, and it was he who should have set out rules of how his deputies could use military personnel, and should have trained or implemented training about appropriate weapon choice of any *de facto* deputy.

Also sued were David Padron, who was an Army MP and a drug suppression team (DST) member from Fort Gordon and Timothy Padron, David's brother, who was along for the ride the night of the incident. It was alleged in the complaint that Dave Padron assisted in the actions of Newton and Glisson. Also, originally named was Steven Green who was a white male who picked up the Plaintiffs' decedent and was the driver of the truck which pulled off from the first stop.

Answers were filed by Kenneth J. Glisson (R. 1-4) and Richmond County and Charles Webster (R. 1-5). A second amended complaint was filed January 14, 1994. (R. 1-38). Kenneth Glisson of Richmond County Sheriff's Department filed an answer to the amended complaint (R. 1-39), as did Sheriff Charles Webster. (R. 1-40). Neither Green nor Newton answered.

The United States answered on behalf of David Padron. The United States was substituted as a Defendant. The United States settled and was dismissed. (R. 3-78).

The order of substance, on the merits from which this appeal is lodged was entered February 21, 1995. (R. 5-90). (App. 17-51). The Order was amended on February 27, 1995 to include a certification for Interlocutory Appeal pursuant to 28 U.S.C. 1292(b). (R. 5-92). The District Court granted summary judgment to all Defendants except the County, which was to stand trial on a custom theory of using Newton as a *de facto* deputy and for the failure to train Glisson in the limits of using Army personnel.

On July 14, 1995, the Eleventh Circuit granted the petition for permission to appeal to Ralph Lowe et al., and for the County to Appeal, respectively. (R. 5-95 & 96).

The Eleventh Circuit affirmed the District Court's grant of summary judgment to all the Defendants who were granted summary judgment below, and in addition, the Circuit granted summary judgment to the County on September 11, 1996.

Statement of Facts

The operative facts of this action began long before the evening of September 2, 1989, when a young black male, in a predominantly black neighborhood, where drugs were sold, became the focus of government attention for less than a minute, before there was government interdiction. A white male in a pickup approached the unknown black male on a corner, and shortly thereafter, he entered the truck which drove off slowly. Because of this, and nothing more than the officer's experience, Ralph Lowe, the young black male, a father of two, became the focus of occupants in a vehicle who had just finished an assignment of quieting a party in the neighborhood, where the young man had visited relatives. The four occupants discussed that a drug deal must be afoot, because a white man "has no business in that neighborhood." They planned to stop the truck, ask the white and black male for ID and what they were doing. The Deputy, who was driving an unmarked, County Sheriff's car turned on some special blue lights, not on the roof top. The unmarked car pulled over and the truck stopped.

Out of the unmarked car came four men in mufti. There was no formal show of authority by the four: one civilian, along for the thrill of the ride, two Army MP's and Deputy Glisson. As the four approached the truck, it pulled away. Deputy Glisson and MP Newton got back into the car, turned on the siren, and in a short distance blocked the truck, which stopped.

What happened at the scene of arrest depends entirely upon the credibility of the Defendant participants, because Lowe is dead. Lowe, a passenger who cannot be blamed for the truck leaving the original scene, was pulled out of the vehicle by MP Newton, who had a MAC-11 machine gun[1] trained on Lowe, threw Lowe to the ground; and while attempting to handcuff Lowe, the unwieldy machine gun fired, causing Lowe's eventual death.

Deputy Glisson pulled the white driver out, did not throw him on the ground, he was given handcuffs by the other MP. Lowe was not made to leave the vehicle by command of the Deputy, rather MP Newton, acting like a long time partner of Glisson, or *de facto* deputy, arrested Lowe. Glisson who was dealing with the white male driver was waiting for MP Newton to come help him. Even though Glisson saw a struggle between Lowe and Newton, he knew from past experience that Newton could handle himself, because in the past whenever he got in trouble, Newton always called for help.

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[1] See, *Searcy v. Dayton*, 38 F.3d 282, 284-85 (6th Cir. 1994) (Waller, an off-duty policeman, turned toward Hileman, and the MAC-11 machine gun discharged killing Hileman).

The Department kept no records by which one could tell whether Newton's arrests had strictly a military connection. From the manner in which this incident occurred and the strong testimony about how Newton was always there, and how he, Glisson and other Army personnel would go do the "street corner thing" looking for regulars, this kind of arrest of civilians, with the military as direct participants, although ostensibly as "backup", was custom. Further, that Military personnel routinely acted as *de facto* deputies is buttressed by the stinging admission that before this incident Glisson had never been told about the limits of the Posse Comitatus Act and prohibitions against direct enforcement of civilian laws, from arrest to being an informant, to the interdiction of vehicles. See A.R. 500-51. ¶ 3-1 through 5; 10 U.S.C. § 371-75. (See District Court's characterization of Facts, App. 18-21; 23-27; 44; 47-49).

Testimony from Deputy Glisson, Lieutenant Kenneth Allen Autry, and Major Ronnie Strength[2] establishes that it was common practice for military policemen from Fort Gordon, who were members of the DST, not only to ride with Richmond County narcotics investigators, but as the evidence indicates, be informants, be spotters and make arrests. (App. 19).

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[2] Charles Webster is the elected Sheriff of Richmond County. He concentrates his efforts on public relations. He delegates law enforcement functions to his two Chief Deputies, Ronnie Strength and Sid Hatfield. Webster Depo. at 24. Chief Deputy Strength handles field personnel and criminal investigation and, according to Webster, is responsible for coordinating cooperative investigations with the Fort Gordon DST. (Webster Depo. at 11, 25, 26). (App. 19).

The statement given by Glisson the night of the incident raises the inference that Dave Padron wanted to go with Glisson and Newton and do the "street corner thing", and show his brother, who was visiting from Miami, some action. (Glisson Depo. 47, Ex. 1). At the first stop, Tim, who was supposed to stay in the car, who exited the car, in this allegedly dangerous neighborhood, did so without remonstrance from Glisson.

Glisson's contact with the neighborhood that night began with a dispatch to quiet a party, a purely civilian matter, in an area of the County near Hephzirah, known as Barton Village. According to Glisson, Major Strength, the policymaker in field or street operations, wanted to know if Glisson had back up, and Glisson replied that he had "Fort Gordon." (Glisson Depo. 45; 47, Ex. 1); (But see Strength Depo. 38, 51-53, in which Strength cannot recall, or such a claim must be in error). The Chief Deputy, who established policy of operation, counted on the people from the Fort to otherwise enforce civilian law.

Glisson, accompanied by his military and civilian passengers, calmed the party and left without incident. While leaving Barton Village, the group saw a white male driving a pick-up truck, stop his truck to talk to a black male pedestrian. The man got in the truck. The driver was Steven Green, and the passenger was Ralph Lowe.

Newton's Status

The District Court rightfully resolved Newton's status on the "night" of the shooting to be unclear. The record shows that Glisson had been using Newton for a long period of time in the same, unclear status prior to

that "night." Formal DST members, like Dave Padron, Dave Cagle and Patrick Newton, had been doing the same kind of things for four and one-half years. (Glisson Depo. 16). The usual duties were surveillance, search warrants, and "to do street corners." "We try to keep street corners clear of street-corner dealers, who, like, stand on the street corner and sell to customers, and our job was to attempt to stop and arrest them." (Glisson Depo. 13). "It's a black neighborhood. We'll look for whites, which have no real business down there, stopping and talking to people." (Glisson Depo. 21). Newton worked with Glisson and others. (Glisson Depo. 29.) They would send Newton down the street in a car with a radio and when the sale was made they would come in and arrest. (Glisson Depo. 30). Newton always came to ride around. (Glisson Depo. 30, 39, 53). What we didn't like was congregating on street corners. If a person is there we would come by and say "Y'all need to move on"; we come back 20 minutes later and he's still there, we'll arrest him for disorderly conduct.[3] (Glisson Depo. 30-31). Newton did what "everybody else did. They would ride around all night and stop people. They would ride around and do "the street corner stuff." (Glisson Depo. 58).

The relationship between the Sheriff's Department and the DST was informal and unclear as to who had what responsibility and authority. The Sheriff's department had no written policy regarding joint investigations,

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[3] The County has a Disorderly Conduct ordinance with a provision making it a crime to be in an area where there are illegal drugs. Richmond County Ordinance Section 12.4-1(15).

and Lt. Autry, who commanded the narcotics division, never independently verified that the military personnel working with the Sheriff's Department were, in fact, military policemen. (Autry Depo. at 13, 16, 18). Most importantly there was no evidence that anyone with Richmond County Sheriff's Department received any training on Newton's limitations, use or manner of action, or his weapon, whether DST or Ride Along, who had become *de facto* deputy.

The informal nature of the relationship between the DST and Richmond County contributes to the confusion about Newton's status on September 2, 1989. Newton conducted undercover drug buys and acted as an investigator working on cases with the Sheriff's Department. (Autry Depo. at 15, 37). The record from Glisson's testimony shows that civilian cases were a clone and a reasonable jury could conclude that Newton worked on civilian cases. Further, when asked about records which might show whether Newton's arrests of people had a military nexus, the response was that there would be no way to tell. To infer that before the night in question, Newton worked exclusively on cases with military record would be clear error. (App. 23-27).

There came a time, however, when Newton's status as a member of the DST was less certain. According to David Cagle, Newton was removed from the DST because he failed a routine drug screening test. (Cagle Aff., ¶ 9; R-5-83). Although no official from Fort Gordon ever told Lt. Autry that Newton was no longer with the DST (Autry Depo. at 49), the evidence in the record establishes

that Richmond County officials had knowledge of Newton's suspected drug use.[4]

The questions surrounding Newton's status because of the drug test did not greatly affect his relationship with the Sheriff's Department. He continued to investigate with County narcotics officers, despite questions about suspected drug use. (Autry Depo. at 24-25).[5] In fact, the night of the shooting, Glisson knew that Newton was not attached to the DST. (Glisson Depo. at 52). No official from Fort Gordon, ever told Autry that Newton had been cleared of wrongdoing.

Actual Supervision of Newton by Glisson

The District Court concluded that Glisson "exercised no supervisory control over Newton at the time of the shooting." (Order at 17, n. 16; R. 5-90). The reason, the Court said, was that Glisson was on the opposite side of the truck. Credibility is key. There were four witnesses to the second stop, and one of them is dead. This event tends to effect what people think they saw, and their

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[4] Lt. Autry testified that there was a time when there was some question about Newton and a "cocaine thing." (Autry Depo. at 23). Autry heard that Newton had failed a urine test and testified that "there's no doubt in my mind something was going on, just like I said about the other, now. But he was – he had did that and everybody was concerned abut him, whether he, you know, was a druggie or not." (Autry Depo. at 23-24).

[5] Glisson testified that Newton "never stopped working with [the DST]." (Glisson Depo. at 49). Newton was always there. (Glisson Depo. at 30; 39; 53).

interest in a clear memory can wittingly, or unwittingly, wane.

A reasonable inference is that Glisson had operated with Newton so much that Glisson's supervision of Newton, and Newton's role as a *de facto* deputy, was so well understood that nothing had to be said. The record reflects that Newton went to the truck and pulled Lowe out and threw him on the ground, without any explicit direction from Glisson. (See Exhibit 1 Glisson Depo. 84; 82-89). A reasonable jury could conclude that Glisson caused the deprivation by failing to act where he had prior knowledge of how Newton acted, and he had an opportunity to supervise, but did not. Glisson was looking in the cab at Green, so it is reasonable to conclude he could see what Newton was doing.

The record also shows that Glisson "noticed that Pat [Newton] was struggling with the passenger." (Glisson Depo., Ex. 1). Glisson did not know whether that "struggling actually means struggling . . . or if it means I saw him over there holding the guy down cuffing him." (Glisson Depo. 97). Glisson did not go to Newton and Lowe, but rather he went back to the car to radio headquarters, because he had confidence that Newton could handle Lowe. (Glisson Depo. 84). The inference being that Glisson had seen Newton do this same kind of activity before, therefore, in spite of Glisson's knowledge of the MAC-11, what happened was likely to happen. (Glisson Depo. 90 & 91).

The evidence shows that Green and Lowe were in the same truck. Because the truck pulled off after the first stop, or because Green and Lowe refused to put their

hands up, (Glisson Depo. 81), Glisson had his gun pulled when he came up to the truck. The inference was that Glisson was afraid of both occupants in the vehicle, and therefore was paying attention to what was happening with Lowe and Newton.

The MAC-11 was an unwieldy weapon for use as a street weappon where you might be doing something like putting cuffs on an arrestee. (R. 5-83; Cagle Aff. ¶¶ 13-20). Glisson knew that a MAC-11 could, without difficulty, easily discharge. (Glisson Depo. 91). Newton was known to wear it while with Glisson, doing the "street corner stuff". (R. 5-83; Cagle Aff.). Glisson knew he had it that night and under the circumstances it was forseeable that he would use it, while arresting a civilian.

REASONS FOR GRANTING THE WRIT

1.

POSSE COMITATUS ACT

There was a willful violation of the Posse Comitatus Act, because there was a knowing, reckless, and direct use of Army personnel to enforce civilian law, notwithstanding the fact that County Deputies did not expressly order MP Newton to arrest passenger Lowe.

Legislative History and Protection by Process of Orders

The Posse Comitatus Act holds a position which is of fundamental import in our democracy. When the Seventh Congress passed the Act it was remarked that Congress had "secured to the people of this country the same great

protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people." 7 CONG. REC. 4686 (1878). The Posse Comitatus Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise, to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both.

18 U.S.C. § 1385. Simply, the military ought not be used, regardless of the manner or quantum of use thereof, to enforce civilian law. *See e.g., Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972); *U.S. v. Redfeather*, 392 F.Supp. 916, 920-925 (D. S.D. 1975).

The panel of the Eleventh Circuit implicitly acknowledged this was indeed what the statute said. The panel did not make this recognition within the text directly discussing the statute's interpretation or application; rather, the acknowledgment, which follows, was mentioned in the qualified immunity discussion.

> Assuming, however, that a *willful use* of a military person to make an arrest would be a violation of the Act under the plain words of the statute (as making an arrest would seem to be a quintessential execution of the law). . . .

Riley v. Newton, No. 95-8873, slip op. at 3500 (11th Cir. Sept. 11, 1996) (emphasis in original) (App. 11). It was nonetheless willing to overlook the "except for express authority" clause.

The legislative history shows that Congress wanted the prohibition to be absolute. 7 CONG. REC. at 3841-49, 4240-4248, 4295. It was to apply to the Commander in Chief down to the lowest officer in the Army "who may presume to take upon himself to decide when he shall use the military force in violation of the laws." *Id.* at 3847. Ignorance of this law was not to be an excuse. *Id.* It was objectionable when Army personnel assisted "sheriffs and deputy sheriffs when there was no law authorizing any such employment." *Id.* at 3849. It honored the principle that at times of peace, the Army should be under the control of the Congress. *Id.* at 4386.

The debate reflects that the use of the Army to enforce civlian laws was to be strictly construed and punishable. However, there was a concern that the enlisted man might be given an order, and he would have trouble discerning its lawfulness, given that the enlisted man has to follow orders, the word "willfully" was added. This is not just any order, but the orders by the process referred to in the Act and the related statutes, or one colorably so. 10 U.S.C. §§ 331-34. See, 83 Yale L.J. 130, 152. Honored in the Breech; Precedential Authority to Execute the Laws with Military Force (1973). Therefore, if proper orders and procedures had not been followed, use of the Army to enforce civilian laws was a willful violation, because the actor knew he had no orders or authority. On the other hand, where an order was given, an enlisted man might find shelter in following the order, if the appearance of its unlawfulness was not clear. On the other hand, if an enlisted man were given an order to shoot a Senator, and he followed it, not only would he be

in violation of the civil laws of murder, but also of the Act. 7 CONG. REC. 4240-48 and 4295-4304.

In this case there is no cause for qualified immunity. See Issue 2. As a matter of separation of powers this Court must follow the intent of Congress. As harsh as it might be for these Defendants to apply the Act as Congress meant the Act to be applied, to have the Eleventh Circuit say the Act has no effect until it has previously ruled on specific similar factual situations, stands the system on its head. Such a position highlights one of the problematic features of qualified immunity, and how a court can too easily get carried away with discussions of what is and when was the law clear; a question ready made for sophistry.

The writ should be granted to elaborate on the Act's meaning when terrorism, especially within, is starting to fester, and the temptation, or need, to involve the Army in heretofore civilian scapes needs Constitutional flexibility, which may be achieved only through fine tuning if rights are to be preserved.

Circuit Split

In the face of the clear language in the Act, and other precedent which the Eleventh Circuit had previously followed, which more logically follows Congressional intent, the Eleventh Circuit chose to follow and apply their 1988 precedent in *U.S. v. Bacon*, 851 F.2d 1312 (11th Cir. 1988). *Riley*, slip op. at 3500. (App. 10). The *Bacon* panel held "that the Act was not violated where an Army investigator aided civilian personnel in a drug investigation because the military participation "did not pervade,

the activities of the civilian officials, and did not subject the citizenry to the regulatory exercise of military power." *Id.* Petitioners believe *Bacon* is factually distinguishable, because there was at least some cognizable military nexus there, as opposed to the "drugs filtering into the military base from all over the County" argument asserted by Defendants herein. The Eleventh Circuit quoted the other test(s) but restricted the Eleventh Circuit to the subjectively unquantifiable "pervaded the activities of the civilian officials test." *Id.; see also, Hayes v. Hawes,* 921 F.2d 100, 104 (7th Cir. 1990) (did military pervade civilian activity).

The panel justifies its holding by declaring without explaining why it chose the test least likely to meet the threshold intended by Congress, declaring in general, and in the negative, that "[t]hese cases make clear" that some "joint investigations" do not violate the Act. *Id.* That however did not address this case, because there has to be a legitimate, cognizable military connection. There was none. (Glisson Depo. 109).

In comparison, the test originally proposed by the District Court in *U.S. v. McArthur,* 419 F.Supp. 186 (D.N.D.), *aff'd sub nom., U.S. v. Casper,* 541 F.2d 1275 (8th Cir. 1976), *cert. denied,* 430 U.S. 970, 97 S.Ct. 1654, 52 L.Ed.2d 362 (1977), and the test of the Eighth Circuit, examines "(1) whether civilian law enforcement officials had made 'direct use' of the military to 'execute the laws;' (2) whether the use of the military 'pervaded the activities' of the civilian officials; or (3) whether the military was used so as to subject 'citizens to the exercise of military power which was regulatory, proscriptive, or compulsory.' *[U.S. v.] Hartley,* 678 F.2d [961] at 978 n. 24

[(11th Cir. 1982), *aff'g* 486 F.Supp. 1348 (M.D.Fla. 1980), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014, (1983), *and cert. denied*, 459 U.S. 1183, 103 S.Ct. 834, 74 L.Ed.2d 1027 (1983)]." *Id.*; see also, *id.* n. 1, citing *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985); *aff'd en banc*, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264, 108 S.Ct. 1253, 99 L.Ed.2d 288 (1988); *see also, U.S. v. Jaramillo*, 380 F.Supp. 1375 (D. Neb. 1974) (Government failed to carry its burden of demonstrating that actions of Army did not pervade actions of civilians); *Wynn v. U.S.*, 200 F.Supp. 457 (1961) (use of military personnel and equipment to aid local Sheriff in effecting arrest of civilian escapee violated Act where there was no Congressional enactment).

There is therefore a split in the Circuits, between the Eleventh Circuit and those Circuits which follow all three tests.

If this Court found that Title IX put Gwinnett County on notice that it could not allow teachers to sexually harrass or abuse students, surely the Posse Comitatus Act put County Sheriffs and Deputies on notice that the military ought not be used in a civilian matter. *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992); *and see, U.S. v. Lanier*, No. 95-1717, *cert. granted*, 116 S.Ct. 2522 (case below *U.S. v. Lanier*, 73 F.3d 1380 (6th Cir. 1996)).

2.

QUALIFIED IMMUNITY UNDER ACT

The law of the Act was clearly defined, given its underlying principles and Congressional intent as shown

though the legislative history. The Eleventh Circuit's parochial view that the law is only clearly defined when it has previously said so, in a case with a high degree of factual similarity negates the Congressional intent of 42 U.S.C. § 1983, to provide a meaningful remedy, where Congress could have, but did not, provide for immunity under these circumstances.

Congressional Intent;
No Qualified Immunity Where No Unclear,
but Unlawful Order to Interpret, and Use of Military
Here, is Without the Statutory Authority

Because enforcing the fundamental principle prohibiting use of the Army to execute the law is so important to democracy, and the autonomy of the States, a qualified immunity is not appropriate here. There was no order which made it difficult to understand whether the natural and forseeable consequences of using Newton as an informant and backup was an authorized execution of the laws by the military. A qualified immunity defense herein would violate the separation of powers given the intent of Congress, as gleaned from the legislative history.

Congress was pulled by two diametrically opposed principles, one largely important to the life of the democracy and the autonomy of states, regarding the appropriate use of armies in the civilian sector, yet Congress did not want the subordinate, who, when someone of authority over him issued an order, to necessarily be in violation of the law. See history cited above in 1.

In this case the Eleventh Circuit is interpreting a statute. Because of separation of powers, a court cannot

say the law does not apply until a court has judicially rewritten or explained it in a certain factual context. If there is a challenge to the Constitutionality of the law on its face, then the courts may address that level of challenge. But when reparations are sought for deprivations of the rights, privileges or immunities created by the law, the court has to apply the law to the facts as best it can, and not treat the government actor as if ignorance of the law is an excuse. In this case, the Defendants can assert no orders which make their duties questionable. From the Sheriff to Glisson, the Constitution and laws which they have sworn to uphold are the same; it just so happens that the law they are charged with violating has strict proscriptions.

The Eleventh Circuit's Parochial View of What's Clear Law and the Split of What and When the Law is Clear

What is clear, if the Eleventh Circuit has its way, and the other circuits adopt the same test as used by the Eleventh Circuit, our Republic will become twelve kingdoms with twelve Constitutions. In the Appellate opinion, the panel cited *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994) slip op. 3499-50 n.1, and referenced the Eleventh Circuit's rule that what is clear is only law from this Court and its own law, on factually similar planes. The circuits are split. *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3rd Cir. 1996) (clear when no gaping divide has emerged in the jurisprudence such that defendants could reasonably expect this circuit to rule to the contrary); *Jermosen v. Smith*, 945 F.2d 547, 551 (2d Cir. 1991), *cert. denied*, 503 U.S. 962, 112 S.Ct. 1563, 118 L.Ed.2d 211 (1992) (the law is

clear based on Supreme Court authority or a circuit court); *Richardson v. Selsky*, 5 F.3d 616, 623 (2d Cir. 1993) (prison officials – what about others – held to standards of their circuit only).

The Constitution as the Supreme Law of the Land will not be uniformly applied, and the longer this system exists, the greater the functional differences, in the Constitution's real application, will become. The Constitution will no longer be an ideal to compel responsive and responsible government behavior, but a small, fact based rule meant to be dodged, with a wink and a nod. Qualified immunity is institutionalizing, through the judiciary, arbitrary and unresponsive government. Functionally this Court is losing its power and import to the circuits through this doctrine, and rights, privileges and immunities are suffering from the endless arguments over what is and when was the law clear. It is a boon for lawyers hourly paid, and a bust for courts, citizens, and their rights. If you want to make something unclear, argue over when it became clear. This is the perfect case to turn the tide and begin to address the deleterious effect endless arguments over qualified immunity have on judicial resources and confidence in the judiciary.

3.

TERRY STOP EXCESSIVE FORCE AND QUALIFIED IMMUNITY

The Plaintiffs' decedent became the target of a proscriptive governmental stop, and ultimately a full blown arrest, because he was a young black male, in a black neighborhood where drugs were sold, and he had been

approached by white driver, who had no business in that neighborhood, at that time of night.

Plaintiff asserted that the initial stop was an unlawful arrest, predicated on race and a hunch. *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Florida v. Bostick*, ___ U.S. ___, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *U.S. V. Armijo*, 781 F.Supp. 1551 (D.N.M. 1991); *Lowery v. Commonwealth*, 388 S.E.2d 265 (Va. App. 1990). The Plaintiffs' injuries naturally flow from the initial, unlawful stop, but each unlawful act thereafter may also have been the proximate cause of the injuries. The matter is for the jury. The Defendants were going to make the white and black man ID themselves and explain what they were doing. *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *see also, Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (state loitering statute void for vagueness because it required a person confronted to give "credible information" to prevent arrest); *Fields v. City of Omaha*, 810 F.2d 830 (8th Cir. 1987) (qualified immunity denied where *Kolender* should have informed officer ordinance was unconstitutional). If the initial stop were unlawful either as an unlawful *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] stop, or an arrest, a citizen in Georgia has the right to resist an unlawful arrest. *Napper v. State*, 200 Ga. 626, 38 S.E.2d 269 (1946). The Plaintiff was a passenger, and even if the "flight" could have been considered culpable flight, it should not have transferred to the Plaintiffs' decedent. While even a certified officer could act out of safety concerns, he would not have been entitled to throw Lowe out of the car on the ground and handcuff him. If during this process, excess force were used, regardless of the lawfulness of the authority to use

reasonable force, the Plaintiffs' decedent had the right of self-defense and to resist that force. Finally, Plaintiffs' decedent had the right not to be needlessly put in the zone of forseeable danger caused by the use of Newton and his unwieldy MAC-11.

The claim that the death was an "accident" misses the mark of training and selection of person and weapon, when it comes to "quintessential" aspects of police work, arresting and cuffing while armed. *Riley v. Newton*, Eleventh Cir. No. 95-8873, slip op. at 3496 & 3500 (respectively). (App. 3 & 11). The focus is causation under 42 U.S.C. § 1983. The Fourth Amendment is implicated because the acts prior to the shooting are a show of governmental power, and those acts, and failures to act, which occurred prior to the instant the hammer hit the bullet, which are deemed to be deprivations of rights and cause injuries, are the grist of this type of claim. The focus here is whether any of the Defendants caused Newton to be there with his unwieldy MAC-11 knowing he would be back-up. By focusing on these acts, courts may assess whether the police were reasonable within the meaning of the Fourth Amendment. Urbonya, *"Accidental" Shootings As Fourth Amendment Seizures*, Hastings Const. L.Q., Vol. 20, No. 2, pp. 337-389 (1993).

The District Court found there was reasonable suspicion. (App. 35-39). The Court cited various cases in which race was a factor. It is Petitioners' contention that each case was distinguishable from the reasons for the stop herein, because there was some current connection to criminality, absent from this case. Each of the indicia

herein, race of driver, race of decedent, drug neighborhood, black neighborhood[6], nighttime are not particularized evidence of crime, and are too frequently associated with innocent activity to be used individually, or in combination, even with the officer's experience, to amount to reasonable suspicion. (See last paragraph Issue 3).

The matter should be sent to the jury on the question of whether a reasonable officer could have believed there was reasonable suspicion that an objective, sufficiently trained officer could arrest, by using the blue light, and then in civilian clothes, exit the vehicle, with the three other agents. *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir. 1984); *Dreary v. Three UnNamed Police Officers*, 746 F.2d 185 (3rd Cir. 1984).

The Eleventh Circuit erroneously determined that the stops and arrest "are not relevant to Glisson's liability for Newton's acts." *Riley v. Newton*, slip op. at 3498 (App. 7). The Eleventh Circuit failed to conduct a *de novo* review of the District Court's conclusions, or their review is clear error. *Ornellas v. United States*, 116 S.Ct. 1657 (1996).

Presently before this Court is *Maryland v. Wilson*, 106 Md. App. n. 4, 664 A.2d 1, 34 Md. 604, 667 A.2d 342

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[6] There are historical reasons mitigating against hasty governmental interdiction in this type of possible crime related to the socioeconomic structure of the neighborhood, all tied to race. *See, Cumming v. Richmond County Bd. of Ed.*, 175 U.S. 528 (1899) (unequal spending based on race constitutionally permissible on Fourteenth Amendment grounds); *Acree v. Richmond County Bd. of Ed.*, 301 F.Supp. 1285 (S.D. Ga. 1969) (desegregation plan to be implemented one generation ago).

(1996), *cert. denied*, 116 S.Ct. 2521 (1996) (Argument set for December 11, 1996) on the issue of whether it is acceptable under the Fourth Amendment for an officer to make the driver exit the vehicle in every stop, where it is argued there was no indicia of danger prior to the order to exit. This Court recently denied *certiorari* in *Ruvalcaba v. City of Los Angeles*, No. 95-1244 (*Cert. denied* May 28, 1996). Certiorari should be granted here to determine the parameters by which an innocent passenger may be made to exit a vehicle, so expectations are settled throughout the Country.

Certiorari should be granted on the race and neighborhood race related issue. The officers should wait for some evidence of crime in this *malum prohibitum* offense. This was not a potential armed robbery like in *Terry*.

4.

MUNICIPAL LIABILITY

The District Court, even without use of the Posse Comitatus Act claim, would have let the case go the jury under a *de facto* deputy theory and the failure to train Glisson on the limited use of Army personnel or Newton. *Riley v. Newton*, at 32-33 (App. 27-47). *See, e.g., Scott v. Van Diver*, 476 F.2d 238 (4th Cir. 1973) (*de facto* deputy).

The District Court applied *City of Canton v. Harris*, 489 U.S. 378, 387 (1989) after thoroughly reviewing the evidence, and concluded in light of the particular duties of Glisson and his use of Newton, and other DST members, that the Department used Newton, and others, as *de facto* deputies; and that the County could not establish as

a matter of material undisputed fact that this custom "was not the moving force behind the alleged deprivation of Lowe's rights." *Riley v. Newton*, slip op. at 33. (App. 48 & 49).

The District Court concluded that with the appropriate inferences summary judgment should be denied because a reasonable jury could find that a custom was the moving force behind the specific deprivation. The District Court understood that "making an arrest would seem to be a quintessential execution of the law", and that there existed facts upon which a reasonable juror could conclude that the County's customs with regard to the use of Army personnel, unregulated in any manner, including as to their choice of weapons, could factually be determined to be the proximate cause of Plaintiffs' injuries, through a deprivation of Fourth Amendment rights. Should this appeal be successful, then also, by a deprivation of privileges and immunities of the Posse Comitatus Act, the Act's "immunity" could be asserted through 42 U.S.C. § 1983. *See, Riley v. Newton*, Eleventh Cir. No. 95-8873, slip op. at 3500. (App. 11).

The Eleventh Circuit's viewpoint on county liability is clouded by its position on the Posse Comitatus Act, that Plaintiff had to show that Glisson directly ordered Newton to arrest Lowe, or that there had to be pre-existing case law "defining [the Posse Comitatus Act] as the failure to prevent military personnel from making arrests when participating in a joint investigation. . . . " *Riley v. Newton*, slip op. at 3500. (App. 11). Should the prior issues be resolved favorably for the Plaintiffs, then review of the entire record would be in order. The grant of summary judgment on entity liability should be

reversed, denying summary judgment on the grounds used by the District Court. Further the Eleventh Circuit's opinion would erroneously take the proximate cause issue from the jury.

The Sheriff testified that he basically is a politician and Major Ronald Strength is the person who runs the Department at the field level. (Webster Depo. 25). According to the Sheriff, Major Strength established the working relationship with the military. (Webster Depo. 24). There were lieutenants to deputies, like Glisson, who worked with the Army personnel, but the Army personnel as deputies did not need to get any clearance before beginning a "joint operation."[7] (Strength Depo. 21). Glisson testified that he had no training on the limits of the use of the Army. (Glisson Depo. 100, 108-09). When the policymaker, Major Strength, told him to take "Ft. Gordon" along for back-up to quiet a civilian party, the only reasonable inference, if back-up is necessary, "Ft. Gordon" will participate directly in an arrest. (Glisson Depo. 47, Ex. 1, Statement by Glisson at 1).

This case falls within that category of training and selection of personnel and weapons, or equipment, that according to the Eleventh Circuit, is "quintessential", and according to *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 n. 10 (1989), is "necessary to a moral certainty." Appropriate decisions of selection and training have to be made long before the person is on top

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[7] It is hard to believe that any juror would ever conclude that what happened that night, given the manner in which the Ride Along program was implemented to become entertainment, was the result of a legitimate joint operation.

of the citizen with an unwieldly weapon, which will, to a moral certainty occur, if the person is used for back up. Note 10 of *Canton* and the importance of "quintessential" training has been eviscerated by the Eleventh Circuit. Even in cases of fundamental training or selection of weapons or equipment, the Eleventh Circuit would require at least one prior bite, if not more. This case is important because it shows the logical limitation of ignoring fundamental training matters, of which *Canton* should have made all sheriffs aware.

The Eleventh Circuit has applied a "pre-text" plus test, or ruled like this is a trial by paper, in violation of *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). The Eleventh Circuit misconstrued one sentence out of the District Court's order. *Riley v. Newton*, slip op. at 3502. (App. 15). The District Court found Plaintiffs had presented evidence of causative custom, and rightfully so.

5.

SHERIFF WEBSTER'S INDIVIDUAL LIABILITY

The Petitioners adopt the arguments above as to the individual liability of the Sherif to train the deputies on the limitations of the use of Army personnel and a MAC-11.

This issue is important to accept for *certiorari*, not only because of the Posse Comitatus Act, and the principle against using the Army to enforce civilian law, but if there is to be any education about elementary governmental principles it can realistically only be expected to

come from sheriffs. If this Sheriff is not held personally responsible for this failure, then sherriffs can always pass the buck and the Act is neutered. This is a unique case about a statute of monumental import and its impact on fundamental freedoms. As terrorism, domestic and foreign increase, the temptation for Army use is there. The debate must be reinvigorated at meaningful levels to provide freedom, but practical protection.

CONCLUSION

For the reasons stated the petition for the writ of certiorari should be granted.

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Fanny M. RILEY, as Administratrix of the Estate of Ralph E. Lowe, deceased; Fanny M. Riley, as next friend for the children of the deceased, Ralph E. Lowe, as the next of kin under the laws of the State of Georgia, Plaintiffs-Appellants-Cross-Appellees,

v.

Patrick NEWTON, individually and in his official capacity as a de facto officer with the Richmond County Sheriff's Department, and in his official capacity as a de facto officer with the U.S. Military Drug Suppression Team, Defendant-Appellee,

Department of the Army, Defendant,

Richmond County, Georgia; Charles Webster, individually and in his official capacity as the Sheriff of Richmond County, Georgia, Defendants-Appellees-Cross-Appellants,

Kenneth J. Glisson, individually and in his official capacity as an officer with the Richmond County Sheriff's Department, Defendant-Appellee,

Dave Padron; Tim Padron; Steve Green; United States of America, Defendants.

No. 95-8873.

United States Court of Appeals, Eleventh Circuit.

Sept. 11, 1996.

Estate and surviving children of arrestee who was fatally shot while being arrested by military police officer brought civil rights action against county investigator

whom officer accompanied on joint drug patrol, county and county sheriff. The United States District Court for the Southern District of Georgia, No. CV 191-171, Dudley H. Bowen, Jr., J., granted defendants' motions for summary judgment in part, and appeal was taken. The Court of Appeals, Schwarzer, Senior District Judge, sitting by designation, held that: (1) investigator did not have duty to intervene and prevent officer's alleged use of excessive force while arresting passenger of truck stopped by investigator; (2) investigator was entitled to qualified immunity on claim that he violated Posse Comitatus Act; (3) county sheriff was entitled to qualified immunity in his individual capacity; (4) county's use of military police officer to accompany county investigator during drug investigation, or its lack of oversight of officer's choice of weapon, could not establish existence of policy or custom to use military to enforce law in violation of Posse Comitatus Act or any other policy and custom that caused military officer to accidentally shoot arrestee; (5) county's failure to train investigator regarding use of military personnel did not amount to deliberate indifference to rights of arrestee; and (6) on county's motion for summary judgment, burden of producing issuable facts was on plaintiff, rather than on county.

Affirmed in part and reversed in part.

Appeals from the United States District Court for the Southern District of Georgia.

Before KRAVITCH and BIRCH, Circuit Judges, and SCHWARZER*, District Judge.

SCHWARZER, Senior District Judge:

Ralph Lowe was accidentally shot and killed while being arrested by Patrick Newton, a military policeman, who was accompanying Richmond County Inspector Kenneth Glisson on patrol. Lowe's estate and his surviving children allege claims under 42 U.S.C. § 1983 (1988) against Glisson, Richmond County Sheriff Charles Webster, and the County. Claims against the United States and other participants in the events that led to Lowe's death have been resolved and are not before us.

The section 1983 claims allege that Lowe was seized without probable cause and subjected to excessive force in violation of the First, Fourth, Fourteenth, and Thirteenth Amendments. The district court granted Glisson's motion for summary judgment, as well as Webster's, limited to his individual capacity; it denied the County's motion and Webster's motion in his official capacity. Plaintiffs appeal from the order granting Glisson's motion, and the County and the Sheriff, pursuant to leave granted by this court, cross-appeal from the denial of their motions. We have jurisdiction under 28 U.S.C. § 1291 and affirm the summary judgment for Glisson and for Sheriff Webster in his individual capacity. We reverse the order denying summary judgment for Richmond County and for Sheriff Webster in his official capacity

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* Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.

and remand with directions to enter judgment for all defendants.

STANDARD OF REVIEW

We review the granting or denial of summary judgment de novo, drawing all reasonable inferences in favor of the non-moving parties. *Swint v. City of Wadley, Alabama,* 51 F.3d 988, 992 (11th Cir.1995); *Bolt v. Halifax Hosp. Medical Center,* 980 F.2d 1381, 1384 (11th Cir.1993). If a genuine issue of material fact exists, summary judgment must be denied. *Hutcherson v. Progressive Corp.,* 984 F.2d 1152, 1155 (11th Cir.1993).

FACTS

On the evening of September 2, 1989, as Inspector Glisson prepared to depart on his regular patrol, he received a call from Sgt. David Padron, an investigator on the Drug Suppression Team (DST) at Ft. Gordon, a nearby Army installation. Padron asked to ride with Glisson to check out local hotels for military personnel. Padron asked Glisson if his brother, who was visiting him, could ride along. Glisson agreed so long as the brother remained in the vehicle, did not carry a weapon, and would be Padron's responsibility. When Glisson met Padron and his brother that night at the sheriff's substation, SPC. Patrick Newton was also there. A former member of the DST, he was assigned to the military police at Ft. Gordon and worked as a confidential source for the DST. He came along to point out individuals whom he had earlier observed dealing drugs.

Ft. Gordon is a large Army installation in Richmond County. To deal with the proliferation of drugs, the military police at Ft. Gordon formed the DST to investigate drug use and trafficking among military personnel. The DST and personnel of the Richmond County Sheriff's Department cooperated informally in particular criminal matters touching on off-base activities involving military personnel. Padron and Newton rode with Glisson from time to time when engaged in drug investigations. Glisson was aware that the team members' authority was limited to assisting in investigations having a military connection and did not extend to investigations or making of arrests in the civilian community.

That evening, Glisson was dispatched to the Barton Village area of Augusta to respond to a complaint of a loud party. Barton Village was known to be one of the most dangerous areas in the city due to extensive drug trafficking and violence. On arrival at Barton Village, Glisson spoke to the person throwing the party and resolved the complaint without trouble. As he resumed his patrol at about 10:30 or 11:00 p.m., he observed a white male in a pickup truck driving through Barton Village. The truck stopped at a corner and the driver began to speak with a black male standing at the corner. After a few seconds, the black male got into the vehicle with the white male. Glisson recognized this incident as typical of a street-corner drug deal, a scenario he had seen repeatedly. He decided to make an investigatory stop. As he turned on his blue lights, the truck pulled over to the curb and stopped. When Glisson and the others got out of the car, however, the truck sped away.

Glisson and Newton jumped back into the car and Glisson gave chase. He cut in front of the truck, forcing it to stop.

Glisson then exited the car and, with his revolver drawn, approached the truck on the driver's side. He repeatedly instructed the driver (later identified as Steven Green) to turn off the ignition and show his hands but the driver did not comply. When he reached the truck, Glisson opened the door, reached in and pulled the driver out, and placed him on the ground. At this point, Padron came up and handed him handcuffs which he snapped on Green.

Glisson then returned to his car to turn off the siren and call for a transport unit. As he passed the window on the truck, he observed that Newton was straddling the passenger (later identified as Ralph Lowe, plaintiffs' deceased) on the ground while attempting to handcuff him. Glisson saw them struggling; Lowe had one hand handcuffed and the other free. As he moved toward his car, he heard a shot. He then heard the man on the ground say "You shot me." Newton turned to Glisson and said, "He hit my gun and it went off." Glisson then returned to his car and called for an ambulance and for Maj. Ronnie Strength of the Sheriff's Department.

INSPECTOR GLISSON'S INDIVIDUAL LIABILITY

Excessive Force. While the district court opinion, and much of the discussion in the parties' briefs, focuses on the legality of the initial and subsequent stops, the crucial issue is whether Glisson can be held liable for Newton's seizure of and use of force on Lowe for which plaintiffs

seek relief. The district court granted summary judgment on all claims challenging the legality of the two stops of Green's truck. We need not address the issues relating to the stops, however, because they are not relevant to Glisson's liability for Newton's acts.

Plaintiffs concede that Newton acted "without any explicit direction from Glisson." (P. Br. 16.) But they argue (apparently for the first time on appeal) that Glisson "was either idly standing by or failed to supervise Newton." *Id.* This court has held that "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir.1995). Plaintiffs have come forward with no facts from which a jury could find that Glisson failed to take reasonable steps to protect Lowe from excessive force. The undisputed facts establish that Glisson was engaged in making the arrest of Green while Newton, on his own, was dealing with Lowe. They were on opposite sides of the truck. When he saw Newton struggling with Lowe, Glisson observed no use of excessive force which might have given rise to a duty to intervene to stop it, nor did he have an indication of the prospective use of excessive force – none occurred until Newton's weapon fired. Because Glisson had no reason to expect the use of excessive force until after it had occurred, he had no reasonable opportunity to protect Lowe, and the obligation to take steps to protect him never arose. *See O'Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir.1988) ("The three blows were struck in such rapid succession that Conners had no realistic opportunity to attempt to prevent them. This was not an episode of

sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator.")

The Posse Comitatus Act. Plaintiffs' principal contention is that Glisson and the other defendants violated the Posse Comitatus Act. That Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, wilfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (1988).

The district court held that Glisson was entitled to qualified immunity on this claim and we agree. "Qualified immunity protects government officials performing discretionary functions from civil trials . . . and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir.1994) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). "For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Lassiter*, 28 F.3d at 1149 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)).

The law of this circuit has not been developed to make it obvious to law enforcement officers what constitutes "wilful use" of the Army "to execute the laws." Specifically, our case law does not make obvious what activities constitute "executing the law" for purposes of the Act; it does not delineate at what point or under what circumstances a joint investigation with military personnel would violate the Posse Comitatus Act. And even more importantly here, our case law does not give any guidance as to what constitutes "wilful use" in the event that the military person's actions would clearly constitute "executing the law."

This court was first faced with a possible violation of the Posse Comitatus Act in *United States v. Hartley*, 678 F.2d 961, 978 n. 24 (11th Cir.1982), *aff'g* 486 F.Supp. 1348 (M.D.Fla.1980), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983), *and cert. denied*, 459 U.S. 1183, 103 S.Ct. 834, 74 L.Ed.2d 1027 (1983). In *Hartley*, we held that the Act was not violated where military inspectors assisted civilian employees in investigating activities devised to defraud the government. *Hartley*, 678 F.2d at 978 (military assistance in the form of handling and testing of shrimp after it had been shipped to government warehouses). In so holding, the court cited three different tests that had been articulated in the Eighth Circuit[1] and

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[1] The Eighth Circuit also considered the Act in *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir.1985); *aff'd en banc*, 800 F.2d 812 (8th Cir.1986), *aff'd*, 485 U.S. 264, 108 S.Ct. 1253, 99 L.Ed.2d 288 (1988). In that case, plaintiffs sought damages based on federal officials' alleged violation of the Fourth Amendment in connection with the occupation of the village of Wounded Knee by federal authorities, including the United States Army. The

cited by the district court in *Hartley*: "(1) whether civilian law enforcement officials had made 'direct active use' of the military to 'execute the laws;' (2) whether the use of the military 'pervaded the activities' of the civilian officials; or (3) whether the military was used so as to subject 'citizens to the exercise of military power which was regulatory, proscriptive, or compulsory.' " *Hartley*, 678 F.2d at 978 n. 24; *see United States v. McArthur*, 419 F.Supp. 186 (D.N.D.) (setting out the three different tests), *aff'd sub nom. United States v. Casper*, 541 F.2d 1275 (8th Cir.1976), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1654, 52 L.Ed.2d 362 (1977). Applying these tests in *United States v. Bacon*, 851 F.2d 1312 (11th Cir.1988), we held that the Act was not violated where an Army investigator aided civilian personnel in a drug investigation because the military participation "did not pervade the activities of the civilian officials, and did not subject the citizenry to the regulatory exercise of military power." *Id.* at 1314 (army investigator assumed undercover role in drug "buys," army funds were used for some of the buys, and army

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court held that an allegation of violation of the Act was sufficient to state a *Bivens* claim under the Fourth Amendment. Putting aside the thorny question whether we may look to the law of other circuits to determine whether clearly established law was violated, *see Hansen v. Soldenwagner*, 19 F.3d 573, 578 n. 6 (11th Cir.1994), *Bisonnette* could not be said to clearly establish the law as to whether the situation at issue here constituted a violation of the Posse Comitatus Act. *Bissonette* passes on the sufficiency of allegations in a complaint; it provides no guidance to one in Glisson's position whose military passenger, lawfully present on a joint drug patrol, attempts on his own initiative to make an arrest that leads to the application of excessive force.

investigator turned over to local authorities drugs and other evidence to assist in the prosecution of a civilian defendant). These cases make clear that, at least under some circumstances, joint investigations with the military do not constitute violations of the Posse Comitatus Act. Thus, merely allowing Newton to ride along to investigate possible drug activity was not a violation of clearly established law.

Our case law does not speak to whether a joint investigation which culminates in the military person arresting a civilian is a violation of the Posse Comitatus Act. Assuming, however, that a *willful use* of a military person to make an arrest would be a violation of the Act under the plain words of the statute (as making an arrest would seem to be a quintessential execution of the law), no case law makes it clear that Glisson could be said to have *wilfully used* Newton to make an arrest. The evidence fails to show that Glisson at any point instructed or encouraged Newton to assist him in the arrests; instead Newton became involved in arresting Lowe upon Newton's own initiative. Absent case law defining "wilful use" as the failure to prevent military personnel from making arrests when participating in a joint investigation, Glisson cannot be said to have violated clearly established law.

Because no reported decisions "make it obvious to . . . [one] in the defendant's place, that 'what he [was] doing' violates federal law," *Lassiter*, 28 F.3d at 1149, we hold that Glisson was entitled to qualified immunity.

SHERIFF WEBSTER'S INDIVIDUAL LIABILITY

The district court held that Sheriff Webster was entitled to summary judgment in his individual capacity and we agree. Defendants concede that Sheriff Webster did not personally participate in any actions leading to the seizure and death of Lowe. But they contend that he may be held liable in his individual capacity for acts or omissions which proximately led to the violation of Lowe's rights, specifically, that the Sheriff should have trained his deputies in the proper use of military personnel who would be working with them.

Like Glisson, Webster is protected by qualified immunity if "[his] conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lassiter*, 28 F.3d at 1149 (quoting *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). Plaintiffs cite to no law or constitutional right that required Webster to train the Department on how to use Army personnel. Instead, plaintiffs point to *Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204-05, 103 L.Ed.2d 412 (1989). That case, however, provides the standard for when a *municipality* can be held liable for a failure to train in general; it does not speak at all to when an individual is responsible for failure to train his subordinates, much less require that a sheriff train a department on how to use Army personnel. *See id.* ("For the law to be clearly established to the point that qualified immunity does not apply, the law must [be] concrete and factually defined. . . . ") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). Plaintiffs having cited no specific law which Webster's

inaction might have violated, he is entitled to immunity from suit.

OFFICIAL LIABILITY OF SHERIFF WEBSTER AND THE COUNTY

Constitutional violation. Plaintiffs' claims are based on alleged violations of section 1983. "Local government may not be sued under § 1983 . . . [unless] execution of a government's policy or custom . . . inflicts the injury. . . . " *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1977). The district court misconceived the basis of municipal liability when it denied summary judgment on the ground that there was "a genuine issue of material fact as to whether the County used Newton as a de facto deputy on September 2, 1989 . . . [and] whether Richmond County officials ever approved of or acquiesced in Newton's choice of weapon." Under *Monell*, liability cannot be imposed on a *respondeat superior* theory. The County's use of Newton on September 2, or its lack of oversight of his choice of weapon, could not establish the existence of a policy or custom to use the military to enforce the law in violation of the Posse Comitatus Act or of any other policy or custom, much less one that may have "caused" the county's officials to subject plaintiffs to the injury complained of. *See Monell*, 436 U.S. at 692, 98 S.Ct. at 2036-37. Plaintiffs have failed to come forward with facts from which a jury could find the existence of any policy or custom leading to a violation of plaintiffs' constitutional rights.

Nor have plaintiffs come forward with facts to support their claim that the County violated section 1983 by failing to train its personnel, in particular Glisson, regarding the use of military personnel to enforce civil law. The district court, relying on Glisson's testimony that he had not received instructions with respect to the use of DST personnel and Newton, denied summary judgment because "Defendants have not established that this deficient training . . . did not cause the alleged deprivation of Lowe's constitutional rights." However, a section 1983 claim for inadequate training exists "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Canton*, 489 U.S. at 388, 109 S.Ct. at 1204. The failure to train must reflect a "deliberate" or "conscious" choice and the deficiency "must be closely related to the ultimate injury." *Id.* at 389, 391, 109 S.Ct. at 1205, 1206. Failure to train only becomes "deliberate" where "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390, 109 S.Ct. at 1205. No facts to sustain such a jury finding have been offered.

Summary judgment. The district court held that if Newton acted as a de facto deputy of the County and "if the shooting was the result of a County policy, practice and custom, the County and Webster may be liable." To deny summary judgment on that ground, however, the court would have had to determine that plaintiffs had raised a genuine issue of material fact by coming forward

with evidence from which a jury could find the existence of such a policy, practice, or custom. Instead, the court placed the burden on defendants, denying summary judgment because "Defendants have failed to carry their burden of establishing that there are no genuine issues of material fact regarding Plaintiffs' claim that Richmond County had a custom of using Patrick Newton as a de facto deputy and of allowing him to use a MAC 11 . . . [and] Defendants have not established that this custom, if it existed, was not the moving force behind the alleged deprivation of Lowe's constitutional rights."

The ruling below reflects a misconception of the summary judgment procedure. The Supreme Court has made it clear that Rule 56 does not require "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325, 106 S.Ct. 2548, 2553, 2554, 91 L.Ed.2d 265 (1986) ("[T]he *Adickes* [*v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)] language quoted above should [not] be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact. . . . [T]he burden on the moving party may be discharged by "showing" – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case."). In *Ryder Intern. Corp. v. First Am. Nat. Bank*, 943 F.2d 1521, 1523 (11th Cir.1991), this court said that "[s]ummary judgment should be granted . . . when, after adequate time for discovery and upon motion, a party fails to make a sufficient showing to establish the existence of an element essential to that party's case on which the party

bears the burden of proof at trial." In *Hammer v. Slater*, 20 F.3d 1137 (11th Cir.1994), we said that "[f]or issues on which the non-moving party will bear the burden of proof at trial, the non-moving party must either point to evidence in the record or present additional evidence 'sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.' " *Id.* at 1141 (quoting *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116-17 (11th Cir.1993)). And in *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir.1989), we said: " 'Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'. . . . 'Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather, as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.* at 257 (quoting *Celotex*, 477 U.S. at 323, 327, 106 S.Ct. at 2552-53, 2554-55).

In denying the motions of these defendants for summary judgment, the district court applied incorrect legal standards and erroneously shifted the burden of producing issuable facts. Because the record shows that defendants are entitled to judgment, we remand with directions to enter judgment in their favor.

AFFIRMED in part, REVERSED in part.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

The Estate of Ralph E. Lowe, through FANNY M. RILEY, as the Administratrix of the Estate of Ralph E. Lowe, deceased, and Fanny M. Riley as next friend for the children of the deceased, Ralph E. Lowe, Jr. and Antonio M. Lowe, as the next of kin under the laws of the State of Georgia,

Plaintiff,

vs.

PATRICK NEWTON, individually and in his official capacity as a de facto officer with the Richmond County Sheriff's Department, and in his official capacity as a de facto officer with the U.S. Military Drug Suppression Team,

and

RICHMOND COUNTY, GEORGIA,

and

CHARLES WEBSTER, individually and in his official capacity as the Sheriff of Richmond County, Georgia,

and

No. CV 191-171

(Filed Feb. 21, 1995)

KENNETH J. GLISSON, individually and in his official capacity as an officer with the Richmond County Sheriff's Department,

Defendants.

ORDER

Before the Court is the Motion for Summary Judgment filed by Defendants Richmond County, Charles Webster, and Kenneth Glisson (the "Defendants") (Nov. 10, 1994) and the Defendants' Objections and Motion to Strike Documentary Evidence Filed by Plaintiffs (Dec. 22, 1994). For the reasons stated herein, the Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part and the Motion to Strike is **GRANTED**.

I. Facts

This action stems from the shooting death of Ralph E. Lowe. On September 2, 1989, Deputy Kenneth Glisson, an investigator with the narcotics division of the Richmond County Sheriff's Department (the "Sheriff's Department") was on patrol. Deputy Glisson had three individuals, none of whom were formal Richmond County Sheriff's deputies, riding with him. Those three individuals were: 1) Dave Padron, a Fort Gordon military policeman and a member of the United States Army's Drug

Suppression Team ("DST")[1]; 2) Tim Padron, Dave Padron's civilian brother visiting for the weekend from out of town; and 3) Patrick Newton, a military policeman from Fort Gordon.

Testimony from Deputy Glisson, Lieutenant Kenneth Allen Autry, and Major Ronnie Howard Strength[2] establishes that it was common practice for military policeman from Fort Gordon, who were members of the DST, to ride with Richmond County narcotics investigators. On this

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[1] The DST is a contingent of military policemen organized to combat drug use in the Army. As part of its mission, the DST engages in joint investigations with the Sheriff's Department.

[2] The command structure of the Sheriff's Department is relevant to the resolution of Defendants' Motion for Summary Judgment. Charles Webster is the elected Sheriff of Richmond County. He concentrates his efforts on administration and public relations. He delegates law enforcement functions to his two chief deputies, Ronnie Strength and Sid Hatfield. Webster Dep. at 24. Chief Deputy Strength handles field personnel and criminal investigation and, according to Webster, is responsible for coordinating cooperative investigations with the Fort Gordon DST. Webster Dep. at 11, 25, 26.

During 1989, Strength supervised four divisions, each commanded by a lieutenant who would in turn coordinate his division's cooperative investigations with Fort Gordon personnel. Strength Dep. at 20. Kenneth Allen Autry was the lieutenant in command of the narcotics division in 1989. Autry Dep. at 8-9.

Autry was the individual who actually managed the relationship between the Sheriff's Department and the DST. There was no regular reporting procedure between Strength's office and the DST, and, on a day to day basis, Strength didn't receive daily reports regarding who was operating on the DST. Strength Dep. at 22. Ken Autry had the best information on that subject. Strength Dep. at 35, 36.

particular night, David Padron was present in his capacity as a member of the DST. His brother, Tim, was present as a "civilian observer." Patrick Newton's status is unclear. It assumed that all four of the men were dressed in civilian clothes.

Glisson's patrol began with a dispatch to quiet a party in an area of Augusta known as Barton Village. Glisson, accompanied by his three passengers, answered the call. The group calmed the party and left without incident.

While leaving the Barton Village area, the group observed a white male driving a pick-up truck. The man stopped his truck to talk to a black male pedestrian. The pedestrian then entered the truck as a passenger. The driver of the truck was Steven Green, and the passenger was Ralph Lowe, now Plaintiffs' deceased. Lowe's entry into the truck aroused Glisson's suspicion, so he decided to conduct an investigatory stop of the vehicle. Glisson turned on his blue lights, and the truck stopped.

Glisson and his passengers exited Glisson's car, and Glisson began approaching the truck. Glisson Dep. at 76-77.[3] As Glisson reached the front of his car, the truck drove away. Glisson and Newton returned to the car and gave chase, leaving the Padron brothers behind. After a short chase, Glisson passed the truck and turned his car sideways in the road, blocking the truck and forcing it to a stop.

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[3] Glisson does not know if anyone else approached the truck because all of the other individuals were behind him. Glisson Dep. at 77.

Glisson and Newton exited their car, and both men approached the truck. Glisson pulled the driver out of the truck and, with the assistance of Dave Padron, handcuffed him.[4] Newton pulled Lowe from the passenger side of the truck and forced him to the ground. While attempting to handcuff Lowe, Newton's weapon[5] discharged, the bullet therefrom striking and eventually killing Lowe.

II. Analysis

A. Summary Judgment Standard

The Court should grant summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The applicable substantive law identifies which facts are material in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"The movant bears the initial burden to show, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). When the *moving* party has the burden of proof at trial, that party must carry its burden at summary judgment by presenting evidence affirmatively showing that,

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[4] The Padrons arrived at the scene by foot.

[5] Newton was carrying his own personal weapon, the now infamous MAC 11 9 mm pistol. This weapon is not an authorized duty weapon for military policemen. Cagle Aff., ¶ 14.

"on all the essential elements of its case . . . , no reasonable jury could find for the non-moving party." *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc). When the *non-moving* party has the burden of proof at trial, the moving party may carry its burden at summary judgment either by presenting evidence negating an essential element of the non-moving party's claim or by pointing to specific portions of the record which demonstrate that the non-moving party cannot meet its burden of proof at trial, *see Clark*, 929 F.2d at 606-08 (explaining *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); merely *stating* that the non-moving party cannot meet its burden at trial is *not* sufficient, *Clark*, 929 F.2d at 608. Any evidence presented by the movant must be viewed in the light most favorable to the non-moving party. *Adickes*, 398 U.S. at 157.

If – and *only* if – the moving party carries the initial burden, then the burden shifts to the non-moving party "to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608. The non-moving party cannot carry its burden by relying on the pleadings or by repeating conclusory allegations contained in the complaint. *Morris v. Ross*, 663 F.2d 1032, 1033-34 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982). Rather, the non-moving party must respond by affidavits or as otherwise provided in Fed. R. Civ. P. 56. "[T]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. A genuine issue of material fact

will be said to exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248.

The clerk has given the non-moving party notice of the summary judgment motion, the right to file affidavits or other materials in opposition, and of the consequences of default; thus, the notice requirements of *Griffith v. Wainwright*, 772 F.2d 822 (11th Cir. 1985), are satisfied. The time for filing materials in opposition has expired, and the motion is ripe for consideration. The Court will proceed to review the applicable substantive law and inquire whether the moving party – and, if necessary, the non-moving party – has carried its burden as set forth above. *See Clark*, 929 F.2d at 609 n.9.

B. Summary Judgment in this Case

Defendants Glisson, Webster, and Richmond County argue for summary judgment on the merits of Plaintiffs' section 1983 claims. Alternatively, Defendant Glisson argues that he is entitled to summary judgment on the basis of qualified immunity.

1. Preliminary Matters: Newton's Status on the Night of the Shooting

Plaintiffs allege that Newton was acting as a de facto deputy for the Sheriff's Department when he shot Lowe. Defendants maintain that Newton was acting as a member of the Army's Drug Suppression Team. Because a genuine issue of material regarding Newton's status will

preclude summary judgment on several claims, the Court must consider this issue.

The relationship between Newton and the Sheriff's Department developed from the larger, cooperative effort between the Sheriff's Department and the DST. Sheriff's Department narcotics officers, including Deputy Glisson, routinely participated in joint drug investigations with DST members. Autry Dep. at 12-13.

The relationship between the Sheriff's Department and the DST, however, was an informal one. The Sheriff's department had no written policy regarding joint investigations, and Lt. Autry, who commanded the narcotics division, never independently verified that the military personnel working with the Sheriff's Department were, in fact, military policemen. Autry Dep. at 13, 16. Autry did know that Newton was an MP, but he never spoke with Newton regarding his authority to participate in joint investigations with the Sheriff's Department. Autry Dep. at 16. Likewise, Autry never asked any Army officer if Newton was authorized to conduct joint investigations with the Sheriff's Department. Autry Dep. at 18.[6]

The informal nature of the relationship between the DST and Richmond County contributes to the confusion about Newton's status on September 2, 1989. David Cagle, chief of DST, denies that Newton was acting as a member of the DST on September 2. Cagle Aff., ¶ 9. Defendants, however, maintain that Newton was acting

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[6] Autry testified that all of Newton's activities appeared to have been constructively approved by Fort Gordon's handling of them. Autry Dep. at 18.

within his authority as a military policeman when he shot Lowe.

There is no dispute that Newton was, at one time, a member of the DST. During this period of time, he conducted undercover drug buys and acted as an investigator working on military related cases with the Sheriff's Department. Autry Dep. at 15, 37. There came a time, however, when Newton's status as a member of the DST was less certain. According to David Cagle, Newton was removed from the DST because he failed a routine drug screening test. Cagle Aff., ¶ 9. Although no official from Fort Gordon ever told Lt. Autry that Newton was no longer with the DST, Autry Dep. at 49, the evidence in the record establishes that Richmond County officials had knowledge of Newton's suspected drug use.[7]

Although Newton never ceased working as a military policeman, there is conflicting evidence regarding the impact that the drug test had on his status with the DST. Lieutenant Autry noticed that Newton ceased conducting drug buys for the DST, a change from his role prior to his positive drug test. Autry Dep. at 24.[8] However, the questions surrounding Newton's status with the DST did not

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[7] Lt. Autry testified that there was a time when there was some question about Newton and a "cocaine thing." Autry Dep. at 23. Autry heard that Newton had failed a urine test and testified that "there's no doubt in my mind something was going on, just like I said about the other, now. But he was – he had did that and everybody was concerned about him, whether he, you know, was a druggie or not." Autry Dep. at 23-24.

[8] When asked if he ever received information that Newton was suspended from participating in the investigative activities of the DST, Autry responded that "I do at that time realize that, you know, if I'm getting reports in and he's the primary person

greatly affect his relationship with the Sheriff's Department, and he continued to do investigative work with County narcotics officers despite questions about suspected drug use. Autry Dep. at 24-25.[9] In fact, on the night of the shooting, Glisson knew that Newton was not attached to the DST. Glisson Dep. at 52.[10] Although Autry apparently recognized a change in Newton's status with the DST, Autry testified that Newton quickly resumed his involvement with the Sheriff's Department.[11] No official from Fort Gordon, however, ever told Autry that Newton had been cleared of wrongdoing.[12]

The evidence presented by the parties, together with all of the materials on file reveals genuine issues of

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buying dope, then I did realize that there was a time when he wasn't buying drugs, if that's what you mean. Yeah, he wasn't buying drugs." Autry Dep. at 24.

[9] Glisson testified that Newton "never stopped working with [the DST]." Glisson Dep. at 49.

[10] Although Glisson saw Newton at Fort Gordon, wearing a regular MP's uniform, Glisson assumed that Newton "was still working for [DST] but attached to [an] MP's company." Glisson Dep. at 49. Regarding his understanding of Newton's function if he was not part of the DST, Glisson testified that "I didn't have an understanding. [H]e did the same thing he had always done. As far as I knew, he still did buys; he still rode with us to do our search warrants, surveillance or whatever, with Fort Gordon." Glisson Dep. at 53.

[11] Autry testified that the concern surrounding Newton's possible drug use was "the sort of a thing that came and went." Autry Dep. at 37. Autry does not know, however, "exactly when it came" and "exactly when it went." *Id.*

[12] Autry testified that, "Nobody actually come out and said, well, he's not into cocaine." Autry Dep. at 49. Autry just assumed that something had gone wrong with the test. *Id.*

material fact regarding Newton's status on September 2, 1989. Defendants have not established, to the extent required by Rule 56, that Newton was not an agent or de facto deputy of the Sheriff's Department.

2. Individual Liability of Deputy Glisson-Qualified Immunity

Plaintiffs have sued Glisson in his individual capacity for alleged civil rights violations and are seeking money damages directly from him. Therefore, Glisson can raise an affirmative defense of qualified immunity. *Swint v. City of Wadley, Ala.*, 5 F.3d 1435, 1441 (11th Cir. 1993), *modified, reh'g, en banc, denied*, 11 F.3d 1030 (11th Cir. 1994), *cert. granted, Swint v. Chambers County Comm'n*, 114 S.Ct. 2671 (1994). Qualified immunity shields government officials who are performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).[13]

The test for qualified immunity is one of objective legal reasonableness without regard to whether Glisson acted with subjective good faith. *Id.* This Court must " 'look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the

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[13] It is well-settled that qualified immunity only protects public officials from lawsuits brought against them in their individual capacity. *Rivas v. Freeman*, 940 F.2d 1491, 1494-95 (11th Cir. 1991).

official at the time the conduct occurred.' " *Id.* at 1441-42 (quoting *Hardin*, 957 F.2d at 848). "[Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Id.* at 142 (quoting *Courson*, 939 F.2d at 1487).

In conducting the objective legal reasonableness inquiry, the Court must apply a two-step analysis. First, "the defendant government official must prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Id.* at 1442 (quoting *Sammons v. Taylor*, 967 F.2d 1533, 1539 (11th Cir. 1992) (internal quotation marks omitted)). The burden then "shifts to the plaintiff to demonstrate that the defendant violated clearly established constitutional law." *Id.* at 1442 (quoting *Sammons v. Taylor*, 967 F.2d 1533, 1539 (11th Cir. 1992) (internal quotation marks omitted).

a. Discretionary Authority

"[A] government official proves that he acted within his discretionary authority by showing objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991).

During their discussion of qualified immunity, Plaintiffs appear to argue that Glisson has not established that he was acting within the scope of his discretionary authority at the time of the shooting. Plaintiffs cite no

authority for their position, and their argument is without merit.[14] Furthermore, at a different point in their brief, Plaintiffs apparently concede that Glisson was acting within the scope of his discretionary authority, arguing that "[t]he absolute discretion which front line officers such as Glisson were given in their use of military personnel in civilian law matters" leads to county liability "notwithstanding immunity for Glisson (which Plaintiffs oppose)." Plaintiffs' Brief at 7.

There is no genuine issue of material fact on this question. Glisson was on patrol in the course of his regular duties as a member of the narcotics division of the Richmond County Sheriff's Department. He was operating within his discretionary authority.

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[14] Plaintiffs argue that:

> In this case, even if the Court were to construe the facts in such a way as to conclude that Newton did not intentionally fire his weapon, there was no mistake in judgment for which Glisson seeks immunity from damages. Instead he seeks immunity for action taken when he, according to him, did not exercise his judgment at all. In light of the purposes for which qualified immunity has been developed by the Court, and the burden of proof which must be borne by Glisson [fn], the Defendant has failed to demonstrate that it is a defense which is properly available to him.

Plaintiffs' Brief at 23. The footnote in this passage states: "That is, that he was exercising his 'discretion' in causing the shooting of Lowe." Plaintiffs' Brief at 23, n.9.

b. Clearly Established Constitutional Law

In completing the second step of the qualified immunity analysis, this Court must decide two questions of law. First, the Court must ascertain the law that was clearly established at the time of the defendant's action, and second, the Court must determine whether the defendant engaged in conduct violative of the rights established by that clearly-established law. *Swint*, 5 F.3d at 1442.

If the law was clearly established at the time of the alleged wrong and a defendant violated that law, the qualified immunity privilege "ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. Before this Court can find that a right is clearly established,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law, the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal citations omitted). Merely finding that an officer's conduct was unlawful will not deprive that officer of the defense of qualified immunity. To lose the defense of qualified immunity, the officer must have crossed a bright line. In this regard, the Eleventh Circuit has noted that:

> [t]he line between lawful an unlawful conduct is often vague. *Harlow's* "clearly established" standard demands that a bright line be crossed. The line is not found in abstractions – to act reasonably, to act with probable cause, and so on – but in studying how these abstractions have been applied in concrete circumstances. *If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.*

Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994) (emphasis added).

As noted *supra*, Glisson was operating within his discretionary authority on the night of the shooting. Therefore, Plaintiffs have the burden of demonstrating that Glisson violated clearly established constitutional law. *Swint*, 5 F.3d at 1442. In meeting this burden, Plaintiffs "cannot rely on 'general, conclusory allegations' or 'broad legal truisms.' " *Post*, 7 F.3d at 1557 (quoting *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir. 1989)).

Ascertaining exactly what law Plaintiffs' contend was clearly established and violated by Glisson is a difficult matter. However, several readings of the three sections of Plaintiffs' brief which address qualified immunity reveal two alleged violations by Glisson: (1) an initial stop of the truck that was not based upon an articulable suspicion of a drug transaction with a palpable military connection; and (2) Glisson's "use" of Newton, who was armed with a MAC 11, to arrest Lowe.

Regarding Plaintiffs' first allegation, that the initial stop of the truck was not based upon an articulable suspicion of a drug transaction, qualified immunity is

unnecessary, as the Court has granted summary judgment against Plaintiffs on the merits of that claim. Section II,B,4, *infra*.

Plaintiffs' second alleged constitutional violation, Glisson's "use" of Newton, who was armed with a MAC 11, to arrest Lowe, is more problematic. Plaintiffs' rely heavily on 18 U.S.C. § 1385. That code section provides that

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, wilfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385.

Plaintiffs' reliance on this statute to establish that Glisson's conduct violated clearly established constitutional law is misplaced. The *Posse Comitatus* statute provides for criminal liability, not a private right of action. *See Lamont v. Haig*, 539 F. Supp. 532 (D. D.C. 1982) (finding no authority for private right of action based upon violation of 18 U.S.C. § 1385).

Furthermore, the authority on the *Posse Comitatus* statute in this Circuit establishes that the actions engaged in by Glisson did not violate that statute. In *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988), the Eleventh Circuit addressed the question of "whether the participation in [a] drug investigation by military personnel for the purpose of assisting state and local agencies in the investigation of cocaine distribution constituted a use of

the military to execute the civil law in violation of the Posse Comitatus Act." The Court answered that "assistance by the military in civil investigations, as here, is not a violation of the Posse Comitatus Act in that the military participation in this case did not pervade the activities of civilian officials, and did not subject the citizenry to the regulatory exercise of military power." *Id.*

The facts of this case are somewhat different from those in *Bacon*.[15] However, it is the Plaintiffs, not Glisson, who have the burden of showing that Glisson's "use" of Newton violated clearly established law, and Plaintiffs have failed to carry this burden. Plaintiffs cite no cases that address the use of military personnel by a state or local law enforcement officer let alone hold that such conduct violates the Constitution. If Plaintiffs desire to deprive Glisson of the shield of qualified immunity, they must do so by demonstrating that some act by Glisson violated clearly established constitutional law. Plaintiffs have failed to meet this burden.[16] Summary judgment is

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[15] In *Bacon*, a criminal case, the Court noted that "an active-duty army investigator assumed an undercover role in working jointly with . . . [a local Sheriff's Department] to ferret out a source of some of the cocaine being supplied to both civilians and army personnel in the Fort Stewart-Hinesville, Georgia, area." *Bacon*, 851 F.2d 1312. The investigator in *Bacon*, "as a member of the military, merely aided civilian personnel in an extensive criminal investigation and did so 'only to the extent of activities normally performed in the ordinary course of [his] duties.' " *Id.* (quoting *United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982) (alteration in original).

[16] In holding that Glisson is entitled to qualified immunity, I note that he exercised no supervisory control over Newton at the time of the shooting. At the time Newton shot Lowe, Glisson

therefore GRANTED in favor of Defendant Glisson on all claims brought pursuant to 42 U.S.C. § 1983.

3. Individual Liability of Sheriff Webster

Defendants argue that Sheriff Webster can be liable to Plaintiffs only in his official capacity. Specifically, Defendants contend that:

> It is undisputed in this case that Sheriff Webster did not have any personal participation in the alleged actions resulting in the constitutional deprivation of plaintiffs' decedent. Therefore the only basis for holding Sheriff Webster liable is through a policy, practice, or custom which can fairly be said to be the official policy of Richmond County or Sheriff Webster which was the "moving force" behind the constitutional deprivation.

Defendants Brief at 19-20. Plaintiffs do not contest the Defendants' contention.

Generally, "[s]upervisors can be liable under section 1983 only if they actually participated in the allegedly wrongful act, or if a causal connection exists between their acts and the alleged violation." *Post*, 7 F.3d at 1560-1561. Although Sheriff Webster may be liable to Plaintiffs in his official capacity, Plaintiffs have not presented any evidence which indicates that he may be liable to them in his individual capacity. Summary judgment is therefore **GRANTED** in favor of Defendant Webster in

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was arresting Green on the opposite side of Green's pickup truck. *See* Glisson Dep. at 84-88.

his individual capacity on all claims brought pursuant to 42 U.S.C. § 1983. As noted *infra*, Webster will remain a defendant in his official capacity.

4. Legality of the Stop

Plaintiffs allege that both stops of Green's truck violated the Constitution. Defendants contend that both stops were legal and that they are entitled to summary judgment on this issue. Assuming, *arguendo*, that a passenger has standing to explore the legality of a vehicle stop, the Court will address this issue.

a. Initial Stop

Defendants maintain that the initial stop of Green's truck was constitutional because Glisson observed a variety of factors which indicated to him that a typical street corner drug transaction was occurring. It is well-established that "[l]aw enforcement officers may briefly detain a person for an investigatory stop if they have a reasonable, articulable suspicion based on objective facts that the person has engaged, or is about to engage, in criminal activity." *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1220 (11th Cir. 1993) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Furthermore, *Terry* allows a police officer "to stop a moving car based on a reasonable suspicion that its occupants are violating the law." *Id.* The reasonable suspicion required by *Terry*, is "at least 'some minimal level of objective justification,' taken from the totality of the circumstances." *Id.* at 1221 (quoting *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989)).

No one factor alone is determinative of whether an officer has a reasonable suspicion of criminal activity. *Sokolow*, 490 U.S. at 7. Rather, determination of whether or not a stop is warranted under *Terry* must be made in light of the "totality of the circumstances." *Id.* at 8. Therefore, several factors, which by themselves may be completely consistent with innocent travel, may justify a reasonable suspicion when taken together. *Id.* at 9.[17] "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* at 10 (quoting *Illinois v. Gates*, 462 U.S. 213, 2430244 [sic 243-44] (1983)).

Defendants cite numerous facts to establish that the stop was justified by reasonable suspicion. First, Defendants note that the Barton Village area, where the stop occurred, is an area with a high rate of crime and drug activity. Autry Dep. at 27, Webster Dep. at 31.[18] Prior to the stop, Glisson observed Green, a white male, stop his truck in the Barton Village area, which is a predominantly black area. Glisson Dep. at 73; Glisson Aff., ¶ 10. Lowe, a black male, approached the truck. Glisson Dep. at 73. The two men conversed briefly. *Id.*; Glisson Aff., ¶ 10. Lowe entered the truck. Glisson Dep. at 73-74; Glisson Aff.,

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[17] In fact, *Terry* itself "involved 'a series of acts each of them perhaps innocent', if viewed separately, 'but which taken together warranted further investigation.' " *Sokolow*, 490 U.S. at 9-10 (quoting *Terry*, 392 U.S. at 22).

[18] Barton Village is also an area where the Sheriff's Department and the DST have previously conducted joint investigations "because of the military involvement with drug trafficking and use in that area." Glisson Aff., ¶ 8.

¶ 10. The truck then drove off. Glisson Dep. at 73-74; Glisson Aff., ¶ 10. Finally, the entire encounter occurred late at night, after dark, between 10:30 and 11:00 P.M. Glisson Dep. at 73; Glisson Aff., ¶ 10. This scenario was one which Glisson had seen over one hundred times, "not only in other areas of Augusta but specifically in Barton Village." Glisson Aff., ¶ 10.

This showing by Defendants meets their initial burden, for summary judgment purposes, of establishing that the stop of Green's truck was justified by reasonable suspicion of criminal activity. The Plaintiffs must now "demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608.

Plaintiffs present three "arguments" to rebut Defendants' showing of articulable suspicion. First, Plaintiffs state that "[t]here is only the mere suspicion that because a black man talked to a white man in a neighborhood where drugs are commonly sold that this was in fact a drug transaction." Plaintiffs' Brief at 10.[19] Plaintiffs

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[19] Although Plaintiffs cite no authority for the proposition, their brief implies that the initial stop of Green's truck was somehow tainted because Glisson considered Lowe's race in deciding to stop the truck. Although the Eleventh Circuit has not addressed the issue, several other Circuit Courts of Appeal have held that race is not an improper consideration in an officer's finding of articulable suspicion, so long as it is not the sole consideration. In *United States v. Weaver*, 966 F.2d 391, 395 (8th Cir. 1992), *cert. denied*, *Weaver v. United States*, 113 S.Ct. 829 (1992), the Eighth Circuit observed:

> We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had [Officer]

ignore the other evidence cited by Defendants: the time of day, the manner of Green's approach, the quick entry into the truck, and the commonality of the "street corner drug transaction" in the Barton Village area. Plaintiffs' underrate the nature of Defendants' evidentiary production on this issue.

Plaintiffs second strategy is to list several characteristics of drug transactions which were not apparent in this case. There is no doubt that, if the factors cited by Plaintiffs were present, Defendants' case for reasonable, articulable suspicion would be even stronger. There is no requirement, however, that a police officer observe every

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> Hicks relied solely upon the fact of [Defendant] Weaver's race as a basis for his suspicions, we would have a different case before us. As it is, however, facts are not to be ignored simply because they may be unpleasant – and the unpleasant fact in this case is that Hicks had knowledge, based upon his own experience and upon the intelligence reports he had received . . . that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver. We wish it were otherwise, but we take the facts as they are presented to us, not as we would like them to be.

Weaver, 966 F.2d at 395 n.2. For additional cases reaching similar conclusions, see *United States v. Franco-Munoz*, 952 F.2d 1055, 1057-1058 (9th Cir. 1991), *cert. denied, Franco-Munoz v. United States*, 113 S.Ct. 3015 (1993); *United States v. Anderson*, 923 F.2d 450, 455 (6th Cir. 1991), *cert. denied, Anderson v. United States*, 499 U.S. 980 (1991), *and cert. denied, McNeil v. United States*, 500 U.S. 936 (1991).

single characteristic on some exhaustive list of characteristics before making a *Terry* stop.

Finally, Plaintiffs argue that "given the fact that the County is relying upon a military back-up, there must be indicia of a military presence to make the initial investigatory stop consistent with the Posse Comitatus Act." Plaintiffs' Brief at 10-11.[20] Although the role of military officials in this matter may eventually lead to some liability for Richmond County, the Court rejects the proposition that the presence of military personnel somehow changes the rule of *Terry v. Ohio* for Glisson, a Richmond County law enforcement officer. *Terry* requires reasonable, articulable suspicion of criminal activity – period. Plaintiffs' argument, carried to its logical conclusion, would require a County deputy to ignore a reasonable, articulable suspicion that murder was being committed if he were accompanied by military personnel unless that murder involved a palpable military connection. The Court will not embrace this argument.

There is no genuine issue of material fact regarding the legality of the initial stop. Glisson possessed a reasonable, articulable suspicion that Lowe and Green were engaging or were about to engage in a drug transaction.

b. Second Stop

Since Glisson possessed reasonable, articulable suspicion sufficient to justify a *Terry* stop of the truck initially, it is axiomatic that he possessed a reasonable, articulable

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[20] Plaintiffs cite no authority for this position.

suspicion to stop the truck a second time. The second encounter, however, was more intrusive than the first. If that stop constituted an arrest, Defendants must establish that Glisson had probable cause for that arrest to win summary judgment on this issue.

"There is no clear line separating arrests from *Terry* stops; the character of the seizure depends on the nature and degree of intrusion under the totality of the circumstances." *Diaz-Lizaraza*, 981 F.2d at 1221.[21] "[G]enerally a person is arrested when, 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *United States v. Franklin*, 972 F.2d 1253, 1256 (11th Cir. 1992), *op. withdrawn*, 5 F.3d 1383 (11th Cir. 1993). Furthermore, "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *Id.* (emphasis in original). The facts establish that the second stop constituted an arrest.

There is no dispute; both Green and Lowe were subjected to substantial physical force at the hands of Glisson and Newton. After the second stop, Green was pulled from his truck and handcuffed. Lowe was pulled from the truck, forced to the ground, and shot.[22] Clearly, a reasonable person in either Green or Lowe's position would

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[21] " 'In determining when an investigative stop ripens into an arrest, no bright line rule exists.' " *United States v Franklin*, 972 F.2d 1253, 1256 (11th Cir. 1992) (quoting *United States v. Hammock*, 860 F.2d 390, 393 (11th Cir. 1988)).

[22] The Eleventh Circuit has noted that "neither handcuffing nor other restraints will *automatically* convert a *Terry* stop into a de facto arrest requiring probable cause." *United States v. Hastamorir*, 881 F.2d 1551, 1556 (11th Cir. 1989) (quoting *United*

have felt that they were not free to leave. Furthermore, after the second stop, it is highly unlikely that Glisson and Newton "would . . . have let [Green and Lowe] leave their custody." *Diaz-Lizaraza*, 981 F.2d at 1221.

Since the arrest of Green and Lowe was supported by probable cause, however, it did not violate the Constitution. " 'Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime.' " *Id.* at 1222 (quoting *United States v. Gonzalez*, 969 F.2d 999, 1002 (11th Cir. 1992)). "Because probable cause is determined from the totality of the circumstances, information obtained during a *Terry* stop can be the basis of probable cause for an arrest, even if probable cause did not exist at the time of the initial stop." *Id.* (internal citation omitted). Therefore, the initial factors observed by Glisson which caused him to develop a reasonable, articulable suspicion of criminal activity will play into the probable cause analysis. I find that the initial factors observed by Glisson combined with the flight of Green and Lowe constituted probable cause for the arrest of both individuals.

In *United States v. Moore*, 456 F.2d 223, 224 (5th Cir. 1972),[23] the Court held that "the flight of the suspects

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States v. Kapperman, 764 F.2d 786, 790 n.4 (11th Cir. 1985)). Rather, the inquiry "is reasonableness." *Id.* (quoting *Kapperman*, 764 F.2d at 790).

[23] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

whose identity was unknown provided the exigent circumstance necessary for a warrantless arrest." Although *Moore's* facts differ from those in this case, it illustrates an important point – flight of a suspect may serve as the final link which converts reasonable suspicion into probable cause.[24]

Plaintiffs argue that the inference to be drawn from the flight of Green and Lowe is "that Mr. Green thought he was about to be ripped off." Plaintiffs' Brief at 11.[25] Having considered all of the facts established at this stage of the litigation, I find that this inference is unreasonable and unsupported by the evidence.[26] In this case, the circumstances observed by Glisson initially, combined with the Green's flight, constituted probable cause for the arrest of both Green and Lowe.[27] Summary judgment is therefore **GRANTED** in favor of all Defendants on all

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[24] Plaintiffs argue that "[t]his court may not add the fact that Green drove away as adding to the calculus of probable cause against Lowe." Plaintiffs' Brief at 12. In support of this assertion, Plaintiffs provide the following cite: "*U.S. v. DiRe*, ___ U.S. ___ (1948)." Plaintiffs' Brief at 12. An extensive computer search reveals no Supreme Court case with the word "DiRe" in the case caption, let alone one from the year 1948.

[25] Evaluation of the reasonable, articulable suspicion supporting the initial stop is based upon Glisson's observations and not upon the fears of Green and Lowe which Plaintiffs argue justified their flight.

[26] I note with particularity Glisson's use of his blue light in effecting the stop of the truck.

[27] The existence of probable cause to arrest, however, will not justify using excessive force to detain a suspect. *Hastamorir*, 881 F.2d 1551, 1556 (11th Cir. 1989).

claims challenging the legality of the two stops of Green's truck.

5. Excessive Force

In an attempt to avoid liability on Plaintiffs' claim of excessive force, Defendants argue that:

> [T]o be liable under the Fourth Amendment for the excessive use of force, the defendant must have seized the plaintiffs' decedent. In this case, Det. Glisson (as well as Sheriff Webster and Richmond County) did not seize Ralph Lowe because Mr. Lowe did not yield to the authority of Det. Glisson and was not physically touched by Det. Glisson.

Defendants' Brief at 14.

Defendants correctly note that "[a]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Menuel v. City of Atlanta,* 25 F.3d 990, 995 (11th Cir. 1994) (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1994)). Defendants conclusion that Lowe was not seized by.Glisson, Webster or the County, however, is not supported by the evidence. "[T]here can be no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner,* 471 U.S. 1, 7 (1985). And, as noted *supra,* a genuine issue of material fact exists as to whether Newton was acting as a de facto deputy of the

Richmond County Sheriff's Department at the time of the shooting. If Newton was acting as a Richmond County deputy and if the shooting was the result of a County policy, practice or custom,[28] the County and Webster may be liable. Therefore, summary judgment is **DENIED** as to the County and Sheriff Webster, in his official capacity, on the issue of excessive force.[29]

6. Liability of Richmond County and Sheriff Webster, in his official capacity[30]

Plaintiffs present two claims against the County. First, Plaintiffs contend that "[t]he custom that leads to County liability . . . is the carrying and substantial likely use of an unwieldy MAC 11 by Newton, who the County apparently was using as a de facto deputy." Plaintiffs' Brief at 4. Second, Plaintiffs claim "what also is at issue is the complete and absolute failure of training by the County to teach it's [sic] deputies . . . on the limitations of

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[28] In this regard, I note Sheriff Webster's testimony regarding the use of force in effecting arrests. Webster testified that, "So if I don't use a polished (sic) procedure or things that's in the polished (sic) procedure, it's not because that I don't believe in it because I do believe in fair play." Webster Dep. at 30.

[29] Obviously, Plaintiffs must still establish the liability of Richmond County and Sheriff Webster, in his official capacity, under the framework set out in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Neither of these two Defendants will be liable under a *respondeat superior* theory for a claim of excessive force.

[30] Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. *Monell*, 436 U.S. at 690, n.55.

the use of military personnel to enforce civilian matters." Plaintiffs' Brief at 5.

a. Liability for Constitutional Deprivation Visited Pursuant to Custom

Local governments are subject to suit under § 1983 "where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978). Local governments may also be sued "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 691. Municipal liability under § 1983, however, cannot be based on a *respondeat superior* theory. *Id.*

In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the wife of an individual shot by police sued the city, arguing that inadequate training of police officers had resulted in the violation of her late husband's constitutional rights. The "policy" relied upon by the plaintiff in *Tuttle* to establish liability was much further removed from the constitutional violation, than was the policy at issue in *Monell*.[31] Recognizing the pitfalls of Plaintiffs' argument, the Court noted that:

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[31] In *Monell*, "[t]he gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." *Monell*, 436 U.S. at 661.

> some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official[.]

Id. at 823.

The Court has dealt with this concern by making causation a mandatory element of a § 1983 claim against a municipality. A municipality cannot be held liable unless action pursuant to official municipal policy of some nature *caused* a constitutional tort. *Id.* at 823-24. *Monell* requires proof of "an affirmative link between the policy and the particular constitutional violation alleged." *Id.* at 823. "[T]he municipal policy must be the 'moving force of the constitutional violation.' " *Id.* at 820 (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)).[32]

"Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Id.* at 824.[33] Furthermore, "an unjustified shooting by a police officer cannot, without more, be thought

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[32] "The fact that a municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell's* requirement that the particular policy be the 'moving force' behind a constitutional violation." *Id.*, n.8.

[33] The Court has assumed, however, "that an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for

to result from official policy." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (citing *Tuttle*, 471 U.S. at 821 (plurality opinion); *id.*, at 830-831, and n.5 (Brennan, J., concurring in part and concurring in judgment)). Plaintiffs, however, do not premise their claims solely on Lowe's death. Rather, they argue that the County had a custom of using Patrick Newton as a de facto deputy and allowing him to use a MAC 11 while effecting arrests. As noted *supra*, there is a genuine issue of material fact as to whether the County used Newton as a de facto deputy on September 2, 1989. Furthermore, the material before the Court indicates that the County had used Newton to affect arrests on previous occasions.[34]

There is also a genuine issue of material fact regarding whether Richmond County officials ever approved of or acquiesced in Newton's choice of weapon.[35] Therefore, Defendants have failed to carry their burden of establishing that there are no genuine issues of material fact regarding Plaintiffs' claim that Richmond County had a custom of using Patrick Newton as a de facto deputy and

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setting policy in that area of the government's business." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1987) (citing *Owen v. City of Independence*, 445 U.S. 622 (1980); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)). Plaintiffs here have alleged no such decision.

[34] Glisson testified that he had seen Newton handcuff individuals when Newton was assisting the Sheriff's Department in making arrests. Glisson Dep. at 93.

[35] *See* Autry Dep. at 42-43 (no one from the Sheriff's Department ever discussed Newton's choice of weapon with him); Glisson Dep. at 90 (Glisson had seen Newton carry the MAC 11 prior to September 2, 1989).

of allowing him to use a MAC 11, a weapon not approved for Richmond County's regular deputies, to effect arrests. Furthermore, Defendants have not established that this custom, if it existed, was not the moving force behind the alleged deprivation of Lowe's constitutional rights. Defendants' Motion for Summary Judgment on Plaintiffs' claim that Lowe's death was caused by a custom of Richmond County is therefore **DENIED**.

b. Failure to Train Glisson

In *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387(1989), the Court recognized "that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." "[I]nadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388.

"The issue in a case like this one, . . . is whether [a] training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent '[county] policy.' " *Id.* at 390. "In resolving the issue of a [county's] liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *Id.* "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 390-91. "Neither will it suffice to prove that an injury or accident could have

been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *Id.* "[T]he identified deficiency in a [county's] training program must be closely related to the ultimate injury." *Id.* Plaintiffs "must still prove that the deficiency in training actually caused" the constitutional injuries. *Id.*

Plaintiffs have alleged that Richmond County failed to train its deputies, particularly Glisson, regarding the use of military personnel to enforce civilian law. Glisson testified that he did not receive any instructions that DST personnel could not be used in investigating purely civilian matters and that there were no limits placed on how he could use Newton. Glisson Dep. at 108-109. Glisson's testimony establishes that there is a genuine issue of material fact as to whether Richmond County failed to train Glisson in the use of military personnel. Furthermore, Defendants have not established that this deficient training, if it existed, did not cause the alleged deprivation of Lowe's constitutional rights. Therefore, Defendants' Motion for Summary Judgment on Plaintiffs' claim that Lowe's death was caused by Richmond County's failure to train its deputies is **DENIED**.

III. Motion to Strike

In response to Defendants' Motion for Summary Judgment, Plaintiffs filed a series of documents which include GBI investigative reports and U.S. Army investigative files. Defendants maintain that these documents, as investigative reports of those two agencies, contain the

conclusions of those agencies as well as hearsay. Defendants further object to these documents on the ground that they do not comply with Fed. R. Civ. P. 56(e) and on the ground that the documents are not sworn to or certified.

Having reviewed the filings by the Plaintiffs, I am compelled to sustain Defendants objections. Much of the material filed by Plaintiffs does not comply with the requirements of Fed. R. Civ. P. 56. With the exception of the affidavit of David Bruce Cagle, to which Defendants do not object, and the depositions of Officer Glisson, Sheriff Webster, Chief Deputy Strength, and Lieutenant Autry, the Court did not consider any material filed by the Plaintiffs in ruling on Defendants' Motion for Summary Judgment.

IV. Conclusion

Summary judgment is **GRANTED** in favor of Defendant Glisson on all claims brought pursuant to 42 U.S.C. § 1983.

Because of the confusion which would likely result were the jury required to grapple with different standards, potentially inconsistent theories of recovery, and confusing concepts of official immunity, this case will proceed to trial on the principal federal law issues, the § 1983 claims. The Court declines to exercise jurisdiction over any pending state law claims against Glisson, and instructs the clerk to **DISMISS** all pending state law claims against Glisson **WITHOUT PREJUDICE**. Summary judgment is **GRANTED** in favor of Defendant Webster in his individual capacity on all claims brought

pursuant to 42 U.S.C. § 1983. Webster will remain a defendant in his official capacity. Summary judgment is **GRANTED** in favor of all Defendants on all claims challenging the legality of the stops of Green's truck. Only background evidence will be heard on this matter at trial. Summary judgment is **DENIED** as to the County and Sheriff Webster, in his official capacity, on the issue of excessive force. Summary judgment on Plaintiffs' claim that Lowe's death was caused by a custom of Richmond County is **DENIED**. Summary judgment on Plaintiffs' claim that Richmond County failed to train its deputies is **DENIED**.

This matter will proceed to trial on Plaintiffs' claims under 42 U.S.C. § 1983 against Richmond County and Sheriff Webster in his official capacity. The Court declines jurisdiction over any pending state law claims against Richmond County and Sheriff Webster.

Plaintiffs, having failed to offer any legal authority to support their position that Defendants violated the *Posse Comitatus* act, may not offer any evidence at trial of any alleged violation of that act.

Finally, Defendants' Motion to Strike is **GRANTED**.

ORDER ENTERED at Augusta, Georgia, this 21st day of February, 1995.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 7 1997
CLERK

(2)

No. 96-934

In The

Supreme Court of the United States

October Term, 1996

FANNY M. RILEY, as Administratrix of the Estate of Ralph E. Lowe, deceased, et al.,

Petitioners,

v.

PATRICK NEWTON, individually and in his official capacity as a de facto officer with the Richmond County, Georgia, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Statement of Facts

Due to the proliferation of narcotic use and activity among military personnel, the Ft. Gordon, Georgia military police formed a Drug Suppression Team.[1] The function of the Drug Suppression Team was to investigate drug use and trafficking involving military personnel. Toward this objective, they reached an informal agreement with the Richmond County Sheriff's Department to participate jointly in drug investigations off base where there was evidence that the illegal narcotics activities involved military personnel.

Patrick Newton and David Padron were military police officers who were members of the Ft. Gordon Drug Suppression Team. David Padron was superior in rank to Patrick Newton and was in charge of the Drug Suppression Team members whenever Dave Cagle, another Drug Suppression Team member, was not present. (R-3-72-2; Glisson deposition at page 18) The defendant Kenny Glisson was a narcotics investigator with the Richmond County Sheriff's Department and at times worked jointly with the Ft. Gordon Drug Suppression Team. (R-3-72-2) Glisson was aware that the Drug Suppression Team members were only authorized by the Department of the Army to assist in drug investigations off base where there was some military connection, i.e. military personnel possessing drugs, purchasing drugs, or individuals who were selling to military personnel. (R-3-72-2; Glisson

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[1] Ft. Gordon is a military installation located contiguous with Augusta, Richmond County, Georgia.

deposition at pages 19, 20) He was also aware that they did not have the authority to go into the civilian community and conduct investigations or arrest individuals without the local law enforcement agency. (Glisson deposition at pages 19-20) The Barton Village area of Augusta was one of the areas where it was known that military personnel purchased narcotics from street corner drug dealers and therefore it was one of the places that the Drug Suppression Team worked jointly with the Sheriff's Department investigating and arresting the street corner drug dealers. (R-3-72-4, 5) Toward this objective, Patrick Newton, a military police officer, who at one time was attached to the Drug Suppression Team, participated in undercover buys of narcotics from street corner drug dealers in Barton Village. (Glisson deposition at page 56) However, Newton never made buys in conjunction with the Sheriff's Department unless there was some type of military connection. (Glisson deposition at page 56) Barton Village is one of the most dangerous areas in Augusta due to the extensive drug trafficking and violent criminal activity in that area. (R-3-72-4; Glisson deposition at page 21; Strength deposition at page 47)

The entire time that Glisson worked with the Drug Suppression Team, he never witnessed any act of excessive force by Patrick Newton or any other member of the Drug Suppression Team. He had never seen them conduct themselves in any way other than as well trained professional law enforcement officers. He had no knowledge of any prior instances of alleged excessive force involving Patrick Newton or any other member of the Drug Suppression Team. He assumed that the officers from Ft. Gordon were well trained in all aspects of police work

including the proper use of force, just as he would assume the same for an officer from any other law enforcement agency. There was never any prior incident that would have put Glisson or any other defendant on notice that any of the officers from Ft. Gordon, including Patrick Newton, were anything but well trained. (R-3-72-6, 7, 8; Glisson deposition at pages 44-47, 123)

At some point prior to September 2, 1989, Glisson had heard rumors that Patrick Newton had allegedly failed a urine test at Ft. Gordon. Later, he heard that Newton had been completely cleared concerning the urine test because his failure of the test was attributed to his handling cocaine during his undercover operation with the Drug Suppression Team. In any event, Newton only quit working for the Drug Suppression Team for approximately two weeks and then continued his activities. He continued to show up at joint operations with the other members of the Ft. Gordon Drug Suppression Team. Neither Glisson nor any member of the Richmond County Sheriff's Department was ever informed directly by anybody at Ft. Gordon that Newton was not a member of the Drug Suppression Team or that he was not authorized to work in the joint operations. (R-3-72-2, 3)

On the evening of September 2, 1989, Glisson received a phone call from David Padron of the Drug Suppression Team. Padron wanted to ride with Glisson and check out some of the local hangouts of the military personnel. Padron told Glisson that his brother was with him and asked if it was all right if he rode along with them. Glisson indicated it was fine as long as his brother remained in the vehicle, did not carry a weapon, and that his brother would be Padron's responsibility. (R-3-72-3)

When Glisson met Padron and his brother that night at the Southgate Plaza at the Southgate Substation of the Sheriff's Department, Patrick Newton was there also. (R-3-72-3) Newton was going to point out individuals that were involved in the sale and use of drugs involving the military that Newton had become familiar with during his undercover duties with the Drug Suppression Team. The four of them went in Glisson's vehicle. (R-3-72-3, 4; Glisson deposition at page 51)

Glisson, however, was contacted by dispatch and requested to go to the Barton Village area of Augusta and respond to a complaint of a loud party. As previously stated, Barton Village is a predominantly black neighborhood which is a high crime area with a great deal of illegal narcotic activities and violent crime. The Ft. Gordon officers accompanied Glisson on the call because of the possibility of military personnel being involved. (R-5-83-7)

Glisson responded to the complaint concerning a loud party and spoke to the person throwing the party. The complaint was resolved without any trouble. As they were leaving the party, it was approximately 10:30 or 11:00 p.m. They then observed a white male in a pickup truck driving through Barton Village. The pickup truck pulled up to a corner and stopped and the driver began conversing with a black male in the corner. After speaking for a few seconds, the black male got into the vehicle with the white male. Glisson, as well as Newton and Padron, immediately recognized this incident as a street corner drug deal. It was a classic scenario which the officers had seen numerous times previously. A white

male driving through a predominantly black neighborhood late at night and approaching a black male on the street corner was a classic modus operandi of a street corner drug deal which the Drug Suppression Team had investigated many times in the past, specifically in this same neighborhood. (R-3-72-4, 5)

Glisson decided to pull the vehicle over as an investigatory stop. He planned on asking the occupants for identification, perhaps patting them down for weapons, and asking them what they were doing. If no further evidence of criminal activity was observed, Glisson would have let the vehicle go on its own way. (R-3-72-5)

Glisson turned on his blue lights and the truck pulled over to the corner. After Glisson and the others got out of their car, the truck immediately sped away. Glisson jumped back into his vehicle and gave chase. Newton was the only other of four who got back in the car prior to Glisson giving chase. After a short distance, Glisson was able to pull his vehicle in front of the truck forcing it to a stop. (R-3-72-5)

Obviously concerned for his safety, Glisson pulled his service revolver and approached the driver's side of the vehicle. He repeatedly instructed the driver to turn off the ignition of the truck and to put his hands where Glisson could see them. The driver of the truck did neither. Glisson then opened the door of the truck, reached in and pulled the driver out and placed him on the ground. By the time he had gotten the driver of the vehicle, later identified at Stephen Green, on the ground, David Padron ran up and handed him some handcuffs. Glisson placed the handcuffs on Mr. Green. (R-3-72-5, 6)

Glisson then quickly headed toward his car to turn off the siren. This was the first time he could see Newton and the passenger. He noted that Newton had the passenger down on the ground and was straddling him while attempting to place handcuffs on the suspect. At this point, Glisson heard a shot. As he approached Newton and the suspect he heard the suspect say "you shot me" and then Newton said to Glisson "he hit my gun and it went off". The passenger, Ralph Lowe, had one hand handcuffed and the other was free. Glisson then went to his car, called for an ambulance, and for Maj. Ronnie Strength of the Sheriff's Department. (R-3-72-6)

The subsequent search of the truck that Mr. Green and Mr. Lowe were in revealed the presence of five marijuana cigarettes, two smoking devices with residue, and a pack of rolling papers. No cocaine was found. (R-3-73-6) However, Mr. Green, upon being interviewed by the Georgia Bureau of Investigation that night, indicated that he was attempting to purchase cocaine from Mr. Lowe and Mr. Lowe told him he would take him to where he could get some. (R-3-73-3)

Patrick Newton was also interviewed by the GBI that night. When asked why he was with Mr. Glisson that night, Newton replied that he was there pursuant to an agreement between Ft. Gordon and the Richmond County Sheriff's Department for joint drug investigations. (R-3-73-2)

The officers did not go to Barton Village specifically to make any drug arrests but were side-tracked by the loud party call. If they had not run across the obvious drug transaction, they would have done routine patrols

looking for military involvement in known drug areas. (R-3-72-8)

There is absolutely no written documentation from Ft. Gordon that Patrick Newton was assigned to the Drug Suppression Team or was ever removed from the Drug Suppression Team. (R-3-74) Apparently, contrary to ordinary Army procedure, all assignments to the Drug Suppression Team were informal and verbal. (R-5-83, 5) There is no written documentation from Ft. Gordon informing the Sheriff's Department that Patrick Newton was not authorized to participate in the joint operations of the Drug Suppression Team. (R-3-74) David Padron, who was Newton's superior, did not indicate to Kenny Glisson on the night of September 2, 1989, in any way that Patrick Newton was not authorized by the Army to participate in joint activities of the Drug Suppression Team or was otherwise not authorized by the Army to be present that night. Neither did David Padron voice any objection to the choice of weapons of Patrick Newton. (R-3-72-7; Glisson deposition at pages 112, 113)

Mischaracterization of Facts In Petitioners' Petition

On page 5 of the petitioners' petition, petitioners state that Glisson did not throw the white driver onto the ground when he removed him from the car. However it is undisputed that Glisson forcibly removed the driver from the car and forcibly placed him on the ground where he was handcuffed. (R-3-72-5, 6)

Contrary to contentions of the petitioners in their petition before this Court, there is no evidence whatsoever that Patrick Newton participated in any joint operation with the Richmond County Sheriff's Department that did not have some involvement with military personnel. The focus of the Drug Suppression Team was to either investigate and arrest military persons possessing drugs or those individuals who were selling drugs to the military. The street corner drug activity that Patrick Newton participated in with the Richmond County Sheriff's Department, specifically in the Barton Village area, was undertaken because it was an area where military personnel purchased drugs from civilian personnel. In fact, when Dave Padron contacted Glisson on the night of September 2, 1989, he indicated that one of his objectives of that night was to look on the street corners for drug dealers selling to military personnel. (Glisson deposition at page 42)

Contrary to contentions of the petitioners in their petition before this Court, there is no evidence that would justify any conclusion that the Drug Suppression Team from Ft. Gordon was used for general civilian law enforcement purposes. Glisson testified in no uncertain terms that everything the Drug Suppression Team did, including Patrick Newton, had some type of military connection. (Glisson deposition at pages 20, 25, 26, 56, and 109) The only limitation that he was unaware of was where the Drug Suppression Team members could be utilized. After all, according to Glisson, military drug involvement can have many locations around the city of Augusta. (Glisson deposition at page 109) There is no testimony that Mr. Newton or other members of the Drug

Suppression Team were ever used for anything other than drug investigations that Glisson and the Drug Suppression Team members from Ft. Gordon thought might have some military connection.

On page 11 of the petitioners' petition, the petitioners theorize that a reasonable jury could find that Glisson caused the alleged deprivation by failing to act because he had a prior knowledge of how Newton acted and that he had an opportunity to supervise but did not. (Petitioner's petition at page 11) However, as noted above, there is absolutely no evidence in the record of any kind whatsoever that Newton had ever acted improperly at any time prior to September 2, 1989. There is no evidence of any kind that Newton had ever committed any civil rights violation, had ever committed excessive force, or had ever been accused of any such improprieties.

REASONS FOR DENYING THE WRIT

I. Posse Comitatus Act

The petitioners submit that this Court should grant the writ on the issue of the Posse Comitatus Act for two reasons. Initially, the petitioners submit that the writ should be granted to elaborate on the meaning of the Act. (Petitioner's petition at page 15) Secondly, the petitioners submit that there is a split in the circuits with regard to the test for determining a violation of the Posse Comitatus Act. The petitioners' contentions in this regard are without merit.

The petitioners' contention that there is a split among the Eighth Circuit and the Eleventh Circuit as to the test used to determine a violation of the Posse Comitatus Act is misplaced. While the District Court in *United States v. McArthur*, 419 F.Supp. 186 (D.N.D.), *aff'd sub nom, United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1654, 52 L.Ed.2d 362 (1977), did espouse three tests for determining whether a violation of the Act has occurred, the Eleventh Circuit Court of Appeals has not held contrary to said decision.

The two Eleventh Circuit cases on this subject prior to the Eleventh Circuit decision in the instant case were *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982); and *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988). In *Hartley* the Eleventh Circuit Court of Appeals applied all three tests from the Eighth Circuit and found that no violation of the Act occurred. See *Hartley* at page 978. In *United States v. Bacon*, the Eleventh Circuit Court of Appeals in a per curiam opinion also found no violation of the Act and cited *Hartley* in support of its holding. Although it is not clear, it also appears the Eleventh Circuit in *United States v. Bacon* applied all three tests. In the case at hand, the Eleventh Circuit Court of Appeals reiterated that in both *Hartley* and *Bacon*, all three tests emanating from the Eighth Circuit were applied. (See App. 10 of petitioner's petition) Therefore, there is no split among the Circuits as to the standard to be applied in determining a violation of Posse Comitatus Statute.

In any event, the petitioners are confused as to the basis of the Eleventh Circuit's ruling on the Posse Comitatus Act. The Eleventh Circuit Court of Appeals did not necessarily rule that there was absolutely no violation of Posse Comitatus Act under the facts and circumstances of

this case, rather the Eleventh Circuit ruled that the law in that regard was not clearly established such that Glisson would have known that his actions and conduct violated the Posse Comitatus Act and consequently would result in a deprivation of the constitutional rights of the petitioners' decedent. (Petition for writ of certiorari, App. 11)

II. Qualified Immunity for Alleged Violations of the Posse Comitatus Act

The Eleventh Circuit Court of Appeals in affirming summary judgment to Glisson and Sheriff Webster held that both were entitled to the defense of qualified immunity because the law concerning posse comitatus was not so well established that Glisson and Webster should have known that their actions violated clearly established statutory or constitutional rights of which a reasonable person would have known. (See petitioners' petition for writ of certiorari, App. 8, 12) The petitioners request that this Honorable Court review said rulings. As best the respondents can determine, the petitioners apparently contend that since a statute is involved, then the law is clearly established such that qualified immunity is not available as a defense. However, the petitioners' contentions in this regard are misplaced and this case does not meet the requirements for the granting of certiorari.

In *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), this Honorable Court held that defendants sued for constitutional violations do not lose their defense of qualified immunity because their conduct violates a statute. Explaining this holding, this Court stated that officials sued only lose their immunity if they are

sued directly for a violation of the particular statute. See *Davis* at 104 S.Ct. 3019 n.12 In this case the plaintiffs are suing the defendants for violation of their constitutional rights pursuant to 42 U.S.C. §1983 not for a violation of the Posse Comitatus Act. The issue in this case which was resolved by the Eleventh Circuit Court of Appeals was whether there was a violation of a Posse Comitatus Act and whether it was clearly established that such a violation under the circumstances in this case was a violation of a clearly established constitutional right of the plaintiffs. Therefore whether the defendants violated the Posse Comitatus Act does not necessarily answer the question of the availability of the defense of qualified immunity.

It is respectfully submitted that the decision of the Eleventh Circuit Court of Appeals affirming summary judgment to Glisson and Webster in his individual capacity on the basis of qualified immunity was eminently correct and fully supported by law. The case law concerning what constitutes a violation of the Posse Comitatus Act and whether such a violation results in a deprivation of constitutional rights is very limited in nature. In fact, as previously pointed out, there were two prior Eleventh Circuit decisions making it appear that the defendants' actions in this case did not violate the statute. See *Bacon, supra,* and *Hartley, supra.*

With regard to the petitioners' contentions that the Eleventh Circuit case law looking only to its own decisions and those of this Honorable Court for determining clearly established law in a qualified immunity context, the Eleventh Circuit opinion in this case removed any such issue as a legitimate basis for certiorari. The Eleventh Circuit did in fact look at case law from other

circuits and determined that there was no help for the petitioners in the case law of other circuits as well. (See petitioners' petition for writ of certiorari, App. 9, n.1)

The petitioners have failed to cite one single case of any factual situation where a local law enforcement officer was found to have violated the constitutional rights of an individual due to an alleged violation of the Posse Comitatus Act. Therefore, Glisson and Webster "could have reasonably believed" that their actions were lawful and both were entitled to qualified immunity in this regard.[2]

III. The Investigatory Stops of the Vehicle

The petitioners' petition also complains of the Eleventh Circuit's decision concerning the lawfulness of the investigatory stop of the vehicle in which the petitioners' decedent was a passenger. The District Court granted summary judgment on this issue finding that both stops of the vehicle were legal and proper. (See petitioners' petition for writ of certiorari, App. 39, 42-43) The Eleventh Circuit Court of Appeals found that the issue regarding the legality of the stops of the vehicle was not relevant to Glisson's liability for the military police

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[2] One reason for the lack of case law in this area is because local law enforcement agencies have no authority over the military and therefore cannot "use" them within the meaning of the statute. This is also evidenced by the congressional record quoted by the petitioners in their petition to this Court in which it was stated that the statute was to apply to the "Commander in Chief down to the lowest officer in the Army . . . ". (See petition for writ of certiorari, p. 14)

officer's actions. (See petitioners' petition for writ of certiorari, App. 7) Therefore the petitioners lost this issue in both the District Court and in the Eleventh Circuit Court of Appeals. There is absolutely no reason for this issue to be reviewed again by this Court.

The petitioners begin their argument on this issue by contending that their decedent became the target of a governmental stop and a full blown arrest because he was a young black male, in a black neighborhood where drugs were sold and he had been approached by a white driver who had no business in that neighborhood at that time of night. (Petitioners' petition for writ of certiorari at pages 20-21) However the truth of the situation is that the plaintiffs' decedent became the target of a governmental stop because he was involved in the sale of drugs on a street corner, attempted to elude the police when the vehicle he was travelling in was lawfully pulled over, refused the officer's commands to raise his hands and exit the vehicle, and physically resisted the military police officer's efforts to secure him for the safety of the officers and bystanders.

The petitioners seem greatly disturbed by the fact that race was one factor in the calculation of reasonable articuable suspicion and that none of the actions observed by the officers were in and of themselves criminal.

However this Court has previously held that the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts. See *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) Furthermore, numerous case law has

indicated that while reasonable suspicion cannot be based solely on race, race can be a factor in determining reasonable suspicion. See *United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985); *United States v. Franco-Munoz*, 952 F.2d 1055 (9th Cir. 1991); *United States v. Anderson*, 923 F.2d 450 (6th Cir. 1991)

The fact that plaintiffs' counsel is apparently disturbed because the race of the two individuals played a part in the officers calculation of reasonable suspicion doesn't make it any less a truism. This was pointed out by the District Court in its summary judgment order by citing the following holding from *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992), *cert. denied, Weaver v. United States*, 113 S.Ct. 829 (1992), in which the Eighth Circuit observed:

> We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had [officer] Hicks relied solely upon the fact of [defendant] Weaver's race as a basis for his suspicions, we would have a different case before us. As it is, however, facts are not to be ignored simply because they may be unpleasant – and the unpleasant fact in this case is that Hicks had knowledge, based upon his own experience upon the intelligence reports he had received . . . that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver. We wish that it was otherwise but we take the facts as they are presented to us, not as we would like

them to be. *Weaver* at 395 n.2 (See petitioners' petition for writ of certiorari, App. 37, n.19)

As pointed out by the District Court, the petitioners' arguments ignore the other evidence besides the race of the participants that went into the calculus of determining reasonable suspicion by the officers; the time of day, the manner of the truck's approach to the street corner, the quick entry into the truck, and the commonality of the street corner drug transactions in that area. (See petitioners' petition for writ of certiorari, App. 37-38)

The petitioners attempt to equate this case to the cases in which an innocent passenger is ordered to exit a vehicle during a traffic stop. However this case is completely different from such situations where during a routine traffic stop in which the driver has committed a traffic violation, the passenger is also requested to exit his vehicle and detained and searched. In this case, there was an actual and obvious drug transaction taking place and when confronted by police officers, the offenders fled creating a legitimate expectation of danger and the necessity for further action which more than justified the officers' subsequent stop, the drawing of their firearms, and the handcuffing of the suspects for everyone's safety.

In the District Court, the defendants argued that they were entitled to summary judgment on this issue on the merits as well as on the basis of qualified immunity. The qualified immunity argument was not reached by either the District Court or the Eleventh Circuit Court of Appeals. Obviously, if both lower Courts felt the basis of the vehicle stop was not a ground for liability, Glisson could have reasonably believed the stop was legal such

that he was also entitled to qualified immunity on this issue. It is therefore respectfully submitted that there is no basis for certiorari on this issue as well.

IV. Municipal Liability

Lastly, the petitioners request that this Court grant a writ of certiorari on municipal liability against Sheriff Webster in his official capacity and Richmond County, Georgia. The respondents submit that there is no basis to grant certiorari on this issue as this is simply not a training case, at least not as it relates to the county defendants.

Several considerations in this regard must be highlighted. It is important to remember that there is no evidence that Patrick Newton was being used regularly to enforce purely civilian matters. Glisson testified (and there is no evidence to the contrary) that he was aware that the Drug Suppression Team from Ft. Gordon could only be involved where there was a military connection. He further testified that Newton was never involved in anything which there was not a palable military connection. The only aspect that he indicated that he was not aware of as to the limitations of the Ft. Gordon Drug Suppression Team was as to where they could operate in conjunction with the Sheriff's Department. Because as he said, the military drug involvement could exist anywhere off base.

Furthermore, there was absolutely no evidence of any kind that there had been any prior problems, any

prior complaints, or any prior alleged constitutional violations committed by the joint operations of the Richmond County Sheriff's Department and the Drug Suppression Team from Ft. Gordon. For a policy maker to be liable for a custom, policy, or procedure, they "must have had actual or constructive notice that the particular omission is substantially certain to result in a violation of constitutional rights of their citizens." *Young v. City of Augusta, Georgia*, 59 F.3d 1160, 1172 (11th Cir. 1995) citing *City of Canton, Ohio*, 489 U.S. at 396, 109 S.Ct. at 1208 (O'Conner, J., concurring in part and dissenting in part). See also *Belcher v. City of Foley, Alabama*, 30 F.3d 1390, 1397-98 (11th Cir. 1994) (the need for more or better training must be obvious or a pattern of constitutional violations must exist such that the municipality knows or should know that corrected measures are needed).

The officers from Ft. Gordon which made up the Drug Suppression Team, including Patrick Newton, had specific authority from the Department of Army to operate off base in cooperation with local law enforcement agencies to investigate those selling drugs to military personnel and possession of drugs by military personnel. These types of arrangements had been approved by the Eleventh Circuit Court of Appeals. See *Bacon, supra* and *Hartley, supra*.

The fact that Newton chose to carry his personal weapon that he may not have been authorized to carry can only translate into liability to the U.S. or to his superior Dave Padron, but certainly not to the Sheriff of Richmond County who had no actual authority over Mr.

Newton.[3] After all, it is undisputed that neither Glisson, Richmond County, nor any other law enforcement officer with the Sheriff's Department had knowledge that Patrick Newton was not authorized to carry or was untrained with the use of the particular weapon he carried that night. Further, there is not the first iota, scintilla or even suggestion of any evidence that the officers from Ft. Gordon, including Patrick Newton, were anything but well trained professional police officers. There is not the first bit of evidence that any of those officers, including Newton, had ever done anything improper or ever conducted themselves other than as professional police officers such that Sheriff Webster or Richmond County were put on notice that there was a need to train his officers further or to train or supervise the Ft. Gordon officers. As previously stated, there is no evidence that the Drug Suppression Team was used for anything other than for a situation where there was some type of palable military connection either through drug dealers selling to military personnel or military personnel possessing drugs. However, assume for the purpose of argument that there was evidence that the Drug Suppression Team, including Newton, overstepped their authority and participated in drug arrests with absolutely no possible military connection prior to this incident. It still does not follow that this would be a basis for liability against these defendants, in the absence of some evidence that the members of the Drug Suppression Team, including Newton, were untrained, incompetent, or had committed constitutional

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[3] This is clearly recognized by the United States as they chose to settle all claims with plaintiffs. (R-3-75)

violations in the past and that these defendants were aware of same.

It therefore begs the question of exactly what the defendant Sheriff and County did wrong. The Sheriff's Department only responded to the request of the United States Army to assist them in their effort to curb the use of narcotics by military personnel and the sale of narcotics to military personnel.[4] As this Honorable Court noted in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) there are very limited circumstances in which an allegation of a "failure to train" can be the basis for liability under §1983. *Harris* at page 1204. In *Harris*, this Court stated that "only where failure to train reflects a 'deliberate or conscious' choice by a municipality can a city be held liable for such a failure under §1983". *Harris* at page 1205. The warning issued by this Court in *City of Canton v. Harris* is never more appropriate than it is in this case:

> In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. [cite omitted] Thus, permitting cases against cities for

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[4] It should be noted that law enforcement agencies from different jurisdictions from all over the country have entered into cooperative agreements to participate in joint investigations involving narcotic activities. Since drug traffickers do not operate within any one jurisdiction, certainly this is a reasonable response to a widely known problem in our society. Any suggestions that such cooperative agreements are somehow unconstitutional or somehow result in civil rights liability to the cooperating agencies is simply frivolous.

> their "failure to train" employees to go forward under §1983 on a lesser standard of fault would result in defacto respondeat superior liability on municipalities – a result we rejected in *Monell. City of Canton, Ohio v. Harris,* at page 1206.

That is exactly what is occurring in this case. There is no evidence in the record to suggest that if Mr. Newton had been carrying a different type of weapon, the results would have been any different. After all, the type of weapon Mr. Newton carried that night is not the only weapon that can discharge accidentally during a struggle with a suspect. Furthermore, there is absolutely no case law cited by the District Court or by the petitioners that would suggest that the Sheriff's Department had a responsibility under the Constitution to approve the type of weapon that an officer from a different agency carried. Likewise, there is no evidence in this case that would justify the conclusion that if Glisson had more instruction on the permissible use of the military (although there was no violation of the Posse Comitatus Act in this case), anything would have occurred any differently. Certainly Glisson still would not have ignored an obvious drug transaction and it would have been completely irresponsible for Newton to allow Glisson to deal with the two occupants in the car under these circumstances, in that neighborhood, at that time of night, all by himself.

It is just as logical to argue that as a matter of law these defendants are entitled to summary judgment because if Mr. Green had not gone to the Barton Village area that night to purchase cocaine, or if Mr. Lowe had not been attempting to sell him cocaine, or if they had not tried to flee in the truck after the initial stop, or if Mr.

Lowe had not resisted Mr. Newton's efforts to handcuff him, he would not have been shot. All of these actions may have resulted in Mr. Lowe not being shot if they had not taken place.

Similarly, if Glisson had ignored the obvious drug transaction, or if Newton had allowed Glisson to deal with the situation himself, Mr. Lowe may not have been shot. However the fact that these events did take place does not render the Sheriff or Richmond County liable for what occurred that night under the decisions of this Honorable Court in *Monell*[5] and *City of Canton, Ohio v. Harris, supra.*

For these reasons, the respondents respectfully submit to the Court that there is no basis for the granting of petitioners' writ of certiorari on the issue of the municipal liability of Sheriff Webster in his official capacity and Richmond County, Georgia.

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[5] *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)

CONCLUSION

For the reasons stated above, the respondents respectfully request that this Honorable Court deny the petition for the writ of certiorari.

Respectfully submitted,

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